COURT OF APPEAL CASES
OF CEYLON:

BEING

Reports of Cases decided by the Supreme Court of Ceylon in its Original and Appellate Jurisdiction, and sitting as a Colonial Court of Admiralty and by His Majesty's Privy Council on Appeal from Ceylon.

EDITED BY

A. St. V. JAYEWARDENE,

Barrister-at-Law.

L. H. De ALWIS,

JAMES JOSEPH,

E. G. P. JAYETILEKE,

Advocates of the

SUPREME COURT.

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COURT OF APPEAL CASES

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REPORTS OF CASES DECIDED BY THE SUPREME COURT OF CEYLON IN ITS ORIGINAL AND APPELLATE JURISDICTION AND SITTING AS A COLONIAL COURT OF ADMIRALTY AND BY HIS MAJESTY'S PRIVY COUNCIL ON APPEAL FROM CEYLON.

COURT OF APPEAL CASES

OF CEYLON

BEING

CASES DECIDED BY THE SUPREME COURT OF CEYLON, THE COURT OF VICE-ADMIRALTY OF CEYLON, AND BY HIS MAJESTY THE KING IN THE PRIVY COUNCIL.

DEONIS *v.* MISSI NONA.

Samarasinghe—*Intervenient.*

No. 7931 D. C. Galle.

Present: **Lascelles C. J. and Middleton J.**

15th November 1911.

Judgment—Decree—Amendment after passing the seal of the Court. sec. 189 Civil Procedure Code—Inherent Jurisdiction of the Supreme Court.

A decree cannot be amended except as provided by section 189 of the Civil Procedure Code. Apart from the provisions of the Civil Procedure Code, the Supreme Court has power to amend its decrees so as to bring them in accordance with its intention as expressed in the judgment. But it has no power to supply an omission which has occurred through inadvertence after the decree has passed its seal.

This action was one for partition of land. The present applicant intervened claiming a portion of the land sought to be partitioned, and prayed that it be excluded from the partition. His claim was dismissed with costs. On appeal the Supreme Court, on the 28th August 1911, varied the judgment of the District Judge by allowing the appellant's claim with the costs of appeal; but no order was made as

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to the costs of the contention in the lower Court. Decree was thereafter duly drawn up in conformity with the judgment, stamped with the seal of the Supreme Court, and the record was returned to the District Court. On the 8th November 1911, the appellant made the present application to amend the decree of the Supreme Court by inserting an order directing the respondent to pay his costs of the contention in the District Court.

Bawa for appellant.—In all cases of appeal where the costs are not mentioned in the decree of the Supreme Court, the rule is that the appellant shall be entitled to recover his costs when the decree of the lower Court is entirely reversed. *I. Thomson 485.* When a decree is entered omitting an order as to costs, it may be amended by adding such order. *Sinnappu v. Punchappu*;[1] *Carlill & Co., v. Rawter.*[2] This Court has inherent power to make the amendment asked for. The order, as it stands now, is absurd, as the appellant has to pay the costs of a contention in which he has been successful.

A. St. V. Jayewardene (*Jayetileke* with him) for respondent.—*I. Thomson 485* refers only to costs of appeal when the judgment of the Supreme Court makes no order at all as to costs. The judgment was pronounced in open Court as required by § 774 of the Civil Procedure Code and that provision is intended to give parties an opportunity of pointing out any error or omission. If no error or omission is then pointed out and the decree passes the seal of the Court the Supreme Court cannot amend the decree except as provided by § 189 of the Civil Procedure Code. The Court, in adjusting the payment of costs, is influenced by various considerations, and it is difficult to recall at this distance of time what tranpsired at the argument of the appeal. It

1. *(1892) I. S. C. R. 121* 2. *(1899) I. Tamb 18.*

may be, the Supreme Court thought the appellant who intervened several years after the institution of the action should pay the Respondent's costs in the lower Court. The head-note to *Sinnappu vs. Punchappu*[1] is misleading. It is no authority for the proposition that a decree can be amended, but it only provides that a decree cannot be amended on an *ex parte* application. The Supreme Court, as it now stands, was constituted by Ordinance No. 1 of 1889 and has the powers which are expressly or impliedly given to it by that statute and no other. *In the matter of the Election of a member of the local Board of Jaffna.*[2]

Bawa in reply. *c. a. v.*

Lascelles C. J.—This is a motion by the appellant to amend the decree of this Court by ordering the respondent to pay the appellant's costs of contention in the District Court. In the District Court the appellant had failed in his contention, and was ordered to pay the respondent's costs. On appeal, however, the appellant succeeded in his contention and was allowed the costs of appeal, but the judgment and decree of this Court are both silent as to the costs in the Court below, with the result that the order of the District Court stands and the appellant is still liable to pay the respondent's costs in the Court below.

There can, I think, be no doubt but that the omission to make order with regard to the costs in the Court below was due to an oversight.

Judgment was pronounced in open Court on the 28th August 1911 at the close of the argument, and the present motion, if made on that date or at any time before the decree was perfected, would almost certainly have been successful. The question for decision is whether the application can be allowed at this stage.

Seetion 189 of the Civil Procedure Code empowers a

1. *I. S. C. R. 121.* 2. *I. A. C. R. 128.*

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Court to amend its decree on certain specified grounds, namely, if the decree is at variance with the judgment or on account of clerical and arithmetical errors, but obviously none of these grounds are available in the present case.

The question, in substance, is whether it is competent to a Court to amend its decree on grounds other than those stated in section 189.

The correction which is now sought for appears to be one which could have been made under the English Slip Order (*0. 28 r. 11,*) *in re Budd,*[1] but that order is wider in its scope than section 189 of the Civil Procedure Code, in as much as it provides for errors arising from accidental slips or omissions and is not limited to the correction of variations between the judgment and decree and clerical or arithmetical errors.

The question then arises whether the Supreme Court possesses inherent power to make an amendment of this nature. That this Court, quite apart from the provisions of the Civil Procedure Code, has power to amend its decrees so as to bring them in accordance with its intention as expressed in its judgment, can hardly be doubted. But it is another matter, after a decree has passed the seal, to supply n omission which has occurred through inadvertence.

In India it has been held under the corresponding Sec. 206 of the Civil Procedure Code of 1882 that a Court should not amend except in accordance with the terms of the section, *Abdul Hayai Khan v. Chunia Kuar.*[2] and in England it has been held that a Court cannot correct a mistake of its own after the judgment has been perfected even though the error be apparent on the face of the judgement. *Charles Bright & Co., Ltd. v. Sellar.*[3]

In the face of these authorities and the absence of any provision in the Courts Ordinance from which it can be

1. *(1887) W. N. p. 251.* (2) *8 All p. 377.* (3) *(1904) I. K. B. p. 6.*

implied that the Supreme Court possesses inherent power to make a correction of this nature, I am obliged to hold, with some reluctance, that we are unable at this stage, to accede to this motion. The motion is dismissed with costs.

Middleton J. I agree.

Proctor for Appellant—*W. E. Weerasooriya.*

Proctor for Respondent—*Henry Gooneratne.*

ABDUL RAHIM v. HASAMAL

No. 3,1848 D. C. Colombo.

Present : **Wood-Renton and Grenier J. J.**

1st December 1911.

Overholding Lessee—Trespasser—Vindictive Damages.

A lessee who overholds the leased premises after the expiry of the term of his lease is a trespasser, and in actions of trespass, even when there is no special damage, the court or jury are not limited to the actual injury inflicted, but may take all the circumstances of the case into consideration.

Both under the Roman-Dutch and under the English law a trespasser is treated as a person who may suitably be punished with vindictive damages.

This was an action instituted by the plaintiff for the recovery of R421·23, being damages sustained by him by reason of the defendant's over-holding certain premises leased to him, after the 30th September, 1910, the date of the expiry of the lease. The plaintiff having re-leased the said premises to one Tholchichand for a period of two years, commencing from 1st October 1910, at a monthly rental of R100, was unable to put the latter into possession, owing to the defendant's failure to quit the premises on the expiration of the lease. In an action brought by Tholchichand, the plaintiff was condemned to pay the sum of R154·23 as damages for failure to put the lessee into possession and the lease was declared cancelled. The plaintiff subsequently

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leased the said premises for a period of three years, at a rental of R125 a month, commencing from 1st December, 1910, to one Alagappa Chetty.

In his answer, the defendant denied liability, alleging that the plaintiff had suffered no damages but had rather gained by reason of the second lease bringing him a higher rental.

The learned District Judge dismissed the plaintiff's action upholding the defendant's contention. The plaintiff appealed.

F. M. de Saram for plaintiff-appellant.—The case of *Wertheim v. Chicoutime Pulp Company*[1] relied on by the learned District Judge does not apply, as it was an action for breach of contract. The present action is one of trespass. An overholding lessee is in the position of a malicious trespasser from whom exemplary damages can be recovered. *See 2 Nathan's Common Law of South Africa 916 ; 3 Maasdorp 215.*

Van Langenberg (with *Tisseveresinghe*) for Defendant—Respondent.—The action is one for the breach of an agreement and therefore the case of *Wertheim v. Chicoutime Pulp Company*[1] applies. The plaintiff suffered no damage whatever by reason of the defendant's overholding. On the contrary, he was considerably benefited.

c. a. v.

Wood Renton J.—The plaintiff appellant sued the defendant respondent in the District Court of Colombo for the sum of Rs. 421·23 as the alleged damages sustained by him by reason of the failure of the respondent to deliver up possession of certain premises leased to him by the appellant. The lease which was dated 12th September, 1908, was for a period of two years commencing from 1st October, 1908, at a monthly rental of Rs. 85, and it, therefore, expired on 30th

1. *(1911) A. C. 301*

September, 1910. The appellant alleged that, in the belief the respondent would deliver up possession of the premises on that date, he had on 1st April, 1910, granted a second lease to one Doulatram Tholchichand for a period of two years from the date of the expiry of the first lease. The respondent did not deliver up possession of the premises till 4th November, 1910, and as the appellant was unable to give Doulatram Tholchichand possession on the day when the second lease commenced, the latter was compelled to pay him the sum of Rs. 154·23 as damages, and the lease was cancelled. On 21st November, 1910, however, the appellant leased the premises in question to Alagappa Chetty for a period of three years from 1st December, 1910, in lieu of 2 years, the term of the lease to Tholchichand, and at a monthly rent of Rs. 125. instead of the rent of Rs. 100. received under the latter lease. The appellant admitted in his plaint that the respondent had paid him a sum of Rs. 85. by way of rent. The amount originally claimed by him was thus reduced to a sum of Rs. 421·23. The practical result is that, if the appellant is entitled to recover damages only for the loss that he has actually incurred in these transactions, viewed as an aggregate, his action must fail, inasmuch as he has gained by the cancellation of his lease to Tholchichand, which put him in a position to grant a longer lease at a higher rental to Alagappa Chetty.

The learned District Judge has held that for the purpose of the present case the appellant's gain or loss on the transactions in question as a whole must be taken account of of, and has accordingly dismissed the appellant's action with costs. Both sides agree that if the appellant is entitled to succeed on the law judgment shall be entered in his favour for the sum of Rs. 321·23. I am unable to agree with the view taken by the learned District Judge of this case. We were referred in the argument to the case of

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Wertheim v. Chicoutime Pulp Company[1] in which it was held by the Privy-Council that the general intention of the law in giving damages for breach of contract is that the plaintiff should be placed in the same position as he would have been in, if the contract had been performed, and that consequently, in the case of late delivery of goods, while the ordinary measure of damages is the difference between the market price at the respective dates of due and actual delivery of the goods purchased, if the purchaser has resold them at a price in excess of that prevailing at the date of delivery, he must, in estimating his damages, give credit therefor. The present action, however, is not one for breach of contract. On the expiry of the term of his lease the respondent became a trespasser, and it is clear law that in actions of trespass, even when there is no special damage, the Court or Jury are not limited to the actual injury inflicted, but may take all the circumstances into consideration [*Mayne on Damages p. 523. Marest v. Harvey*;[2] and *Nathan s Common Law of South Africa, Vol. 2 section 916.*]

Both under the Roman Dutch and under the English law, as will appear from the authorities just cited, a trespasser is treated as a person who may suitably be punished with vindictive damages. (See also the recent English case of *Cope v. Sharpe* (No. 2).[3]

On the grounds above stated, I would set aside the decree of the District Court dismissing the appellant's action and direct judgment to be entered for the appellant for the sum of Rs. 321·23 with the costs of the action and of the appeal.

Grenier J.—I am of the same opinion. The defendant must be regarded as a trespasser, not necessarily malicious, and

1 *(1911) A. C. 301.* 2 *(1814) 5 Taunt : 442.* 3 *(1911) 2 K. B. 837.*

is clearly liable in damages to the plaintiff, I cannot see how the fact of plaintiff having been materially benfited by the lease to Alagappa Chetty can enter into the question of damages in which the defendant had made himself liable in law by reason of non delivery of possession of the demised premises at the expiration of the lease to him. The right of the plaintiff to recover damages in the circumstances of this case is, I think, unquestionable under the Roman Dutch law.

Proctors for appellant—*de Livera and Jacolyn.*

Proctors for respondent—*Prins and Swan.*

SENANAYAKE *v.* COORAY.

1762. D. C. Ratnapura

Present **Lascelles C. J. and Middleton J.**

30th August 1911.

Proctor—Physical presence in Court—Appearance—Injunction—Proof of service—Secs. 85 and 86 Civil Procedure Code—Observations on character of litigants in judgments on facts not elicited in evidence improper.

Where on the day fixed for the trial of a case the defendant was absent and his Proctor on the record, who was present in Court, stated that he had no instructions, but the District Judge proceeded to hear the plaintiff's case and entered a final judgment for the plaintiff,

Held that the casual presence of the Proctor in Court without any instructions to represent his client at the trial is not an appearance so as to make the trial an *inter partes* one and enable the Court to enter final judgment.

Per Middleton, J. 1 Where an injunction is granted there should be a copy of it together with proof of service in the record.

2 A judge who by being long stationed in a District has become acquainted with the idiosyncracies of litigants frequenting his Court should not introduce into his judgment facts within his knowledge applying to them which have not been elicited in evidence.

Senanayake v. Ooray

This was an action for declaration of title to a ½ share of a land, and for an injunction restraining the 1st defendant from mining for plumbago therein, and also for damages on account of plumbago which defendants had wrongfully removed. The 1st defendant filed answer alleging title in himself to the share claimed by the plaintiff. At the trial, on the 4th May 1911, the 1st defendant was absent, and his Proctor, who happened to be in Court at the time, stated that he had had no instructions from his client, Thereupon the learned District Judge proceeded to hear the plaintiff's case and entered final judgment in favour of the plaintiff. On the 15th May, 1911, the 1st defendant filed an affidavit moving the Court to reopen the judgment and to set aside the decree entered in the case. The learned District Judge dismissed the application with costs, and the 1st defendant appealed from that order.

Van Langenberg (with him *de Sampayo, K.C.*) for the 1st defendant-appellant.—The presence of the appellant's Proctor on the day of trial was a mere accident. He had no instructions from his client, and it cannot therefore be said that he appeared on behalf of his client. The mere statement by a Proctor that he has no instructions from his client cannot be taken to be an appearance within the meaning of § 24 of the Civil Procedure Code. The Proctor mentioned that he had no instructions merely out of courtesy to the Bench. *Mohammadu Lebbe v. Kiri Banda*[1] is in point.

Bawa (with *Samerewickrame* and *Jayetileke*) for the plaintiff-respondent.—It cannot be said that the Proctor's presence was casual. He appeared in Court and stated that he had no instructions. It is submitted that this is a sufficient appearance in law to make the judgment an *inter partes* one. See *Gargiel v. Somasundaram*,[2] and *Perumal Chetty v. Gunetilleke*.[3]

1. (1907) 2. A.C.R. 170. 2. (1905) 9 N.L.R. 26
3. (1908) 4 Bal. 2.

Van Langenberg in reply.—The cases cited do not apply. There the Proctor appeared on behalf of the client and applied for a postponement. [*Lascelles, C.J.*—What order would you ask us to make in case we are disposed to interfere?] The appellant should be placed *in statu quo.*

c. a. v.

Middleton J.—This was an action for declaration of title, damages and an injunction in respect of a half share of plumbago land against the 1st defendant, the plaintiff allotting to the 2nd defendant the other half share in the land.

Upon the acceptance of the plaint the court ordered an injunction to issue returnable forthwith and on the 8th March, 1910, it was ordered to be issued, but I can find no copy of it or any proof that it was served on the 1st defendant in the record.

The 1st defendant's answer denied the title of the plaintiff, and, alleging title in himself, sought the dismissal of the action and claimed damages in reconvention for unlawful restraint from mining for plumbago.

The replication, it was alleged, did not traverse the 7th paragraph of the answer.

On the 25th April, 1911, an application by the proctors on both sides for an adjournment of the trial day was refused, and the case came on for trial on the 4th May.

On that date the 1st defendant was absent, and his proctor on the record who was present in court stated he had no instructions, but the District Judge proceeded to hear the plaintiff's case, and entered a final judgment for the plaintiff as claimed.

On the 17th May, 1911, an application and affidavit by the 1st defendant were filed, and motion made to set aside the decree "from the step of default," and notice having been served on the plaintiff the question was discussed, and the 1st defendant cross-examined on his affidavit on the

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5th July and the application to re-open the judgment dismissed with costs on July 6th.

Against that order the 1st defendant now appeals, and the main question for our decision is whether the physical appearance of the 1st defendant's proctor in the Court, coupled with what he said on the trial day, constituted, technically, an appearance for the 1st defendant which would give the proceedings the character of an *inter partes* trial and so enable the District Judge to enter a final decree. The cases of *Gargial et al: v. Somasunderam Chetty,*[1] and *Ahamado Lebbe v. Kiri Banda*[2], were cited by counsel and it seems to me that those cases are quite reconcileable and afford good bases for the decision of the question now before us. In the former case the circumstances as detailed by Chief Justice Layard shewed that a proctor, whose position was questioned, did, in fact and law, appear, while in the latter it was clear that he did not. It is somewhat difficult to say in such a case what is the principle upon which a Court should act in deciding whether there is an appearance or not, but I think each case must be determined upon its own circumstances. In the present case it seems to me that the 1st defendant's proctor was casually present in Court but, probably through his client's negligence, without any instructions to represent his client at the trial, and I would hold that this is not an appearance so as to make the trial an *inter partes* one and enable the Court to enter final judgment.

I think also that the application to the District Court decided on the 6th July was rather an application to set aside the judgment entered, on the ground that it was wrongly entered in a final character than an application to set aside a decree *nisi* which the learned counsel for the

1 (1905) 9 N.L. 26. (1907) 2 A.C.R. 170.

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respondent argued was the case.

It is true I think that the affidavit made by the 1st defendant or his cross-examination on it does not afford by any means a sufficient excuse for his absence or his failure to instruct his counsel to appear for him and summon the witnesses mentioned in his list.

I think also it is clear from the pleadings and on the evidence adduced for the plaintiff that it was an extremely hazardous thing for the District Judge to enter a final judgment for the plaintiff in a matter of title to immovable property as he did.

In my opinion therefore the appeal should be allowed and the order and judgment of the District Court set aside with the direction to try the case *de novo.*

The 1st defendant ought to have the costs of his appeal, but I would order him to pay his own costs of the application and all the plaintiff's costs incurred by the abortive trial on the 4th May as between proctor and client, as he has adduced no sufficient reason why he did not instruct his proctor to appear and defend his case on the day he knew was fixed for the trial of the case.

As regards the injunction, although it was prayed for in the plaint and apparently granted as a matter of course, it seems to me that, if it was granted there should have been a copy of it with proof of service on the 1st defendant to be found in the record, and in the absence of this it is difficult to say if it was in fact issued. The argument *ad misericordiam* on the ground of the magnitude of the damages accumulated against him on the judgment may therefore have some foundation.

I take occasion also to suggest, with reference to the learned Judge's observations on the character of the 1st defendant, that although it is inevitable that a District Judge who has been long stationed in one District must be-

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come acquainted with the idiosyncrasies of the litigants frequenting his Court, it is advisable not to introduce into a judgment facts within his knowledge applying to them which have not been specifically elicited in evidence in the particular case before him. The appeal is allowed.

Lascelles C.J.—I entirely agree in the judgment and order proposed by my brother Middleton.

Proctor for appellant—*J. Vandenberg.*

Proctor for respondent—*A. Wijetileke.*

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF INDURUWE SUMANGALA PIYADASI NAYAKE TERUNNANSE, DECEASED.

MEDANKARA UNANSE—*Petitioner-Respondent*

v.

ANDRIS—*Petitioner-Appellant*

No. 592 D. C. Ratnapura.

Present: **Wood Renton and Grenier J. J.**

11th December, 1911.

Testamentary proceedings—Party impeaching will—Status—Residence outside jurisdiction of Court—Plaintiff—Defendant—Security for costs—Testamentary capacity—Undue influence—Onus of proof—Secs. 416, 386, 533 Civil Procedure Code.

A party resident out of the jurisdiction of the Court, who files a petition of opposition to the grant of probate of a will and himself applies for probate of another will, is not in the position of a plaintiff within the meaning of § 416 and is not liable to give security for costs.

Per Grenier, J.—The wording of § 416 Civil Procedure Code contemplates a regular action in which the parties are described specially as plaintiff and defendant . . . . . Testamentary actions and proceedings stand on quite a different footing from regular actions as the term has been understood since the Civil Procedure Code came into operation, and the provisions of §§ 533 and 386 cannot be construed in such a way as to place the appellant in the position of a plaintiff within the meaning of § 416. It is only in case the appellant fills

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that position completely that he can be required to give security for costs.

A person who has not been made a respondent to an application for probate and on whom no order *nisi* had been directed to be served but who claims a grant of probate for himself of another will admittedly executed by the testator comes within the words "any person then appearing to be interested in the administration of his deceased's property" in § 533 Civil Procedure Code and is entitled to oppose the application for probate.

Per Wood Renton J.—No proposition of law is more clearly settled than this, that the person who propounds a will must show that it is a valid testamentary act, and that although the incidence of proof may change in the course of a trial, it is on his shoulders that the burden of proving testamentary capacity ultimately rests.

The respondent applied for probate of the will of one Induruwe Sumangala Piyadasi Nayaka Terunnanse, and an order *nisi* was entered in terms of his prayer. The appellant filed a petition impeaching the will already produced and applying to have another will, in which he had been appointed heir, declared the last will of the deceased.

The appellant being resident beyond the jurisdiction of the District Court of Ratnapura, the respondent moved for an order on the appellant to deposit security for the costs of the contention under § 416 of the Civil Procedure Code. The learned District Judge allowed the application and the present appeal was taken from that order.

Samerewickrame for appellant.—Testamentary proceedings are proceedings *in rem* and, as such, should be decided on the merits and not on objections of this nature: see § 533, Civil Procedure Code. Probate must be granted to the person really entitled, and, when a dispute arises, it must not be decided as a proceeding between two parties: see § 519 and § 534 proviso, Civil Procedure Code. The term "action" as defined in § 6 of our Code applies to regular actions and not to testamentary proceedings. Moreover, the appellant was really in the position of a defendant. As soon as the appellant filed his petition of objections

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the onus of proving the will in solemn form was on the executor. (*Pieris v. Pieris.*[1])

Bawa for respondent.—The appellant cannot rely on § 533 inasmuch as he is not a beneficiary under the will. [*Wood Renton, J.* : He is a person "appearing to be interested in the administration of the deceased's property."] No, he is a petitioner asking for probate. He is in the position of a plaintiff, inasmuch as he brings a will into Court and asks the Court to accept it as the real will.

c. a. v.

Wood Renton, J.—The material facts of this case are shortly as follow :—

Induruwe Sumangala Piyadassi Nayaka Terunnanse died on 7th October, 1910. The respondent propounded in the District Court of Ratnapura what purported to be his last will and testament. It was dated 12th July, 1902. The respondent is the sole surviving executor appointed under it. In support of his application for probate he put before the District Court a sufficient *prima facie* case of the due execution of the will, and an order *nisi* declaring his status and granting probate was made. The appellant filed a petition of objections to the order *nisi* being made absolute on the ground of the existence of a prior will in his favour dated 17th January, 1899. This latter will is revoked by a general clause of revocation in the will of 12th July, 1902. The respondent does not deny its execution, but relies on its revocation. The appellant, on his side, does not dispute the fact of the execution of the will of 12th July, 1902, but contends that the testator was not of sound mind at the date of its execution, and was induced to execute it by the undue influence of the respondent. It would appear that both the appellant and the respondent are pupils of the testator. The point to be

1. (1906) 9 N.L.R. 14.

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decided in the present appeal is whether or not the District Judge was entitled to make, as he has made, an order requiring the appellant to give security in Rs. 2,500 with one surety for the costs of the respondent in the testamentay proceedings. The appellant is not resident within the jurisdiction of the District Court of Ratnapura. Before the order under appeal was made two issues had been framed :—

1. Had the testator, at the time of the execution of the will, a sound and disposing mind ?

2. Was the execution of the will due to coercion and undue influence exercised on the testator by the respondent ?

The burden of proof, in regard to the first of these issues, is clearly on the respondent. The plea of undue influence, however, must be established by the appellant (*Pieris v. Pieris.*)[1] The learned District Judge has held incorrectly that the *onus probandi* as to testamentary capacity rests on the party who impeaches it. No proposition of law is more clearly settled than this, that the executor who propounds a will must show that it is a valid testamentary act, and that, although the incidence of proof may change in the course of a trial, it is on his shoulders that the burden of proving testamentary capacity ultimately rests. The District Judge, however, rightly held that it was for the appellant to prove his plea of undue influence. His reasons for ordering the appellant to give security were, that he is practically in the position of a plaintiff in the testamentary proceedings; that § 533 of the Civil Procedure Code directs that the issues arising in such proceedings between parties in the position of the appellant and the respondent respectively shall be tried in accordance with the provisions of § 386, that is to say, as nearly as possible in conformity with the rules prescribed for the taking of evi-

1 (1906) 9 N.L.R. 14.

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dence at the trial of a regular action, and that, as the appellant, is not resident within the jurisdiction of the District Court of Ratnapura, he should be called upon under § 416 to give security for costs. No authority directly bearing on the point of law raised in this appeal was cited to us in argument, and I am not aware of any. But on general principles, and in view of the language of the sections of the Civil Procedure Code above referred to, I am of opinion that the order under appeal was wrong. The burden of proof of testamentary capacity is not upon the appellant, and even if it had been, that fact would not have put him in the position of a plaintiff, for the purpose of the testamentary pro-proceedings. The real plaintiff in these proceedings is the respondent. The only application with which the Court has directly to deal, in the first instance, is his application that probate should be granted of the will of 12th July, 1902. The appellant's direct and primary object in coming before the Court is to prevent that probate from being granted, although, no doubt, he prays in his petition that the earlier will should be allowed to remain good, and § 534 of the Civil Procedure Code empowers the Court, if it holds that the objections to the probate of the will of 12th July, 1902, have been made out, to grant probate of the will of 1899. It was argued by Mr. Bawa that the appellant had no status under § 533 of the Civil Procedure Code, inasmuch as he had not been made respondent to the application for probate of the will of 1902; the order *nisi* had not been directed to be served upon him, and he could not bring himself within the words " any person then appearing to be interested in the administration of the deceased's property." No objection to the status of the appellant was taken in the District Court and apart from that, it seems to me that he does come within the clause just quoted. He declares in his petition of objections that he is interested in the proper-

ty of the testator under the will of 1899. The existence of that will is not disputed by the respondent.

On the grounds above indicated I would set aside the order of the District Judge requiring the appellant to give security, and send the case back to the District Court for trial on the issues. The appellant is entitled, in any event, to the costs of the appeal, and to the special costs, if any, of the argument in the District Court on the points which the appeal raises. All other costs should be costs in the cause.

Grenier J.

The facts are fully stated in the judgment of my brother which I have had the advantage of reading. I may add that in the whole course of my experience, both at the Bar and on the Bench of the District Court of Colombo, I have never known of any case similar to the one now before me, in which the Court required security for costs from a person in the position of the present appellant, on the ground that he was not resident within the jurisdiction of the Court. The will of 1899 propounded by the appellant is earlier in date than the one produced by the respondent, and I understand the appellant impeaches this later will on the ground that the testator was not at the time of its execution of a sound and disposing mind, and that the execution of the will was due to coercion and undue influence on the testator by the respondent. I fail to see how the order requiring the appellant to give security for costs can be justified. Such an order would work manifest injustice and wrong in numerous cases in which wills are impeached either as forgeries or on other sufficient grounds. It will place an embargo on the full and free investigation into testamentary dispositions of property, both movable and immovable, and will offer a premium to persons so inclined, to put forward false and fictitious wills. Apart, however, from these considerations,

Medankara Unanse v Andris

Grenier J

there is no warrant for the procedure adopted by the District Judge in any sections of the Civil Procedure Code that have been cited to us. I doubt very much if the appellant in this case can be assigned the position of a plaintiff and the respondent that of a defendant within the meaning of § 416. The very wording of this section contemplates a regular action in which the parties are described specifically as plaintiff and defendant. The section is as follows :—

" If at the institution or at any subsequent stage, of the action, it appears to the Court that a sole plaintiff, is or (when there are more plaintiffs than one) that all the plaintiffs are residing out of the jurisdiction of the Court, the Court may in its discretion, and either of its motion or on the application of the defendant order the plaintiff or plaintiffs........to give security for the payment of all costs........"

Testamentary actions and proceedings stand on quite a different footing from regular actions, as the term has been understood by us since the Civil Procedure Code came into operation; and I do not see how the provisions of §§ 533 and 386 can be construed in such a way as to place the appellant in the position of a plaintiff within the meaning of § 416. It is only in case the appellant fills that position completely that he can be required to give security for costs. I am distinctly of opinion that the appellant is a very long way off from it, and that neither § 533 nor § 386 has any application here. The suggestion was a very ingenious one, and that is the only merit it has.

As regards the appellant's status, I think there can be no question that he was a person interested in the administration of the deceased's property, and he has rightly been admitted into these proceedings.

The appeal must be allowed with costs, as directed in the judgment of my brother. Rajapakse v. Rajapakse

Proctor for Appellant—*C. F. Dharmaratne.*

Proctor for Respondent—*Daniel Jayatilleke.*

RAJAPAKSE v RAJAPAKSE.

No. 10,353 D. C. Galle.

Present: **Lascelles C. J. and Middleton J.**

29th November 1911.

Proctor—Lien for costs—Secs 75 and 212 Civil Procedure Code—English Law introduced impliedly.

Where the defendant paid money into court for the plaintiff's use, but the plaintiff was decreed to pay defendant's costs, the plaintiff's Proctor is entitled to a lien over the money paid into Court in respect of costs payable to him by his own client.

No distinction can be drawn between the costs which the opposing party is orderd to pay and costs which the Proctor is entitled to have taxed and to recover from his own client.

Perera v Perera [1] followed.

The principle of the English Common Law with regard to a solicitor's lien for costs has been impliedly introduced into Ceylon.

Semble, The Roman-Dutch Law would not allow such a lien.

Per Lascelles C. J.—The lien which is recognised not created, by §§ 75 and 212 can hardly be any other than the lien allowed by English Law being a right depending upon the principle that a Proctor is entitled to a charge upon property recovered or preserved where meritorious services of the Proctor result in such recovery or preservation.

In this case the defendant-respondent deposited in Court for the plaintiffs'—use the sum of Rs. 200, and judgment was entered in favour of the plaintiffs for that sum on the 15th March, 1911, but they were ordered to pay the defendant's costs. On the 4th May 1911, the defendant got his bill of costs taxed, and on the 9th May, the 9th appellant,

(1) 11. N.L.R.I.

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who is the proctor for the plaintiffs, moved the Court that his lien as proctor, on the amount deposited in Court be made matter of record, and soon after tendered his bill for taxation on notice to his clients. There was some delay in serving notice, and in the meantime the defendant issued writ on the 17th July, 1911, and seized the amount deposited in Court on the 1st August, 1911. The question of the proctor's lien came on for discussion before the learned District Judge, who by his order dated 13th September, 1911, disallowed the proctor's lien with costs. The appeal is against this order.

Bawa for the plaintiffs-appellants.—The lien contended for by the 9th appellant is recognised by §§ 75 (e) and 212 of our Code; also in *Perera v Perera*.[1] The legislature in framing these sections had in view the solicitor's lien under the English Law and the principles of the English Law apply. A proctor who by his efforts obtains judgment for his client has a charge in the nature of salvage upon any property recovered: *See Annual Practice* (*1911*) ii. *552; Greer v. Young*[2] *; In re Suffield*[3]*; Charlton v. Charlton*[4]*; Hunt v. Austin*[5] and *Emden v. Carte*[6].

A. St. V. Jayewardene for the defendant-respondent.—The lien claimed does not exist under our law, nor does the Roman-Dutch Law recognize it: *1 Thomson 556; 2 Pereira's Institutes 416; Groenewegen C. IV. 333; 3 Burge 602; 2 Van Leeuwen, 330, 444*; *2 Maasdorp 254*. Sections 75 (e) and 212 only recognise a lien of a limited character. They contemplate the existence of a decree for costs in favour of the party whose proctor is claiming the lien. In both sections the words "in respect of the costs payable to him under the decree" are used and the lien is therefore recognised only as regards costs payable under a decree. In the present case

1. *(1907) 11 N. L. R. 1.*
2. *(1883) 24 Ch. D. 587.*
3. *(1888) 20 Q. B. D. 693.*
4. *(1883) 52 L. J. Ch. 971.*
5. *(1888) 47 L. T. 300.*
6. *(1881) 45 L. T. 328.*

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there is no decree for costs in favour of the clients to give the proctor his lien. In *Perera v. Perera*[1] there was such a decree. In this case therefore §§ 75 e) and 212 do not apply. The proctor's costs cannot be recover d except by separate action as provided for by §§ 214 and 215 of the Code. The lien cannot be sustained in this case, because at the time it was claimed the 9th appellant's bill of costs had not been taxed. A lien can only be claimed in respect of an ascertained amount.

Bawa in reply.—Sections 75 (e) and 212 have been badly worded. The words "under the decree" ought to be considered as surplusage, otherwise the sections are meaningless, as pointed out by Hutchinson C. J. in *Perera v. Perera.*[1] The mere absence of a decree for costs in his client's avour should not deprive the proctor of his lien over property recovered through his exertions. The limitation contended for by the respondent would nullify the effect of the lien conferred by §§ 75 (e) and 212. The fact that the bill was not taxed at the date of the claim is no bar : *De Bay v Griffin*[2].

c. a. v.

Lascelles C. J.—This appeal raises the question, whether the plaintiff's proctor is entitled to a lien for the costs, on a sum paid into Court by the defendant in discharge of the claim in a case where the plaintiffs were ordered to pay the defendant's costs.

On the 21st December, 1910, the defendant deposited Rs. 200 in Court for the use of the plaintiffs. Judgment for that amount was entered in favour of the plaintiffs on the 15th March, 1911, the plaintiffs being ordered to pay the defendant's costs. The defendant on May 4th got the bill of costs taxed, and on the 9th May, the 9th appellant, who is the plaintiffs' proctor, moved the Court that his lien on the sum of Rs. 200 be made matter of record.

1. *II N. L. R. I.* 2 *(1875) 2. L. R. Ch. 291.*

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Some delay took place in taxing the 9th appellant's bill of costs and before taxation the defendant on 17th July seized the sum of Rs. 200 under his writ. When the matter came on for discussion the learned District Judge decided adversely to the lien claimed by the 9th appellant, and the present appeal is against this decision.

It appears to be at least doubtful whether the Roman-Dutch Law would allow the lien for which the appellant contends.

According to Maasdorp,[1] an attorney or conveyancer has a lien on documents in his possession for the costs of professional services rendered by him or expenses incurred by him upon or with respect to such documents, but it does not appear to be settled that a legal practitioner has such a lien for his costs upon the amount of a judgment obtained by him in favour of his client.

The appellant's case thus depends upon the view that the Civil Procedure Code has, by implication, introduced the principle of the English Common Law with regard to a solicitor's lien for costs rather than upon any principle of the Roman-Dutch Law.

The only sections of the Civil Procedure Code which bear on the question are sections 75 (e) and 212. These sections run as follows: Section 75 (e): "When the defendant sets up a claim in reconvention, the answer must contain a plain and concise statement of the facts constituting the ground of such claim which the defendant makes in reconvention. A claim in reconvention duly set up in the answer shall have the same effect as a plaint in a cross action so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross claim; *but it shall not affect the lien upon the amount decreed of any proctor in respect of the costs*

1. *2 Masdorp*, 254.

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payable to him under the decree. Section 212: "The Court may direct that the costs payable to one party by another shall be set off against a sum which is admitted or is found in the action to be due from the former to the latter *But such direction shall not affect the lien upon the amount decreed of any proctor in respect of the costs payable to him under the decree.*"

The construction of these sections is not free from difficulty, as decrees, under the practice which prevails in Ceylon, do not specifically direct the payment of costs to the proctor. The difficulty appears to arise from the phraseology of § 111 of the Indian Civil Procedure Code of 1882 having been adopted without the modification required by the procedure in force in Ceylon.

In *Perera v. Perera*[1] Hutchinson C.J., commenting on these sections, observed: "What are the costs payable to him under the decree? The decree never orders any costs to be paid to the proctor. I do not see what the phrase can mean, unless it means such of the costs, which the other party is ordered to pay to the proctor's client, as the proctor is entitled to recover from his client. These enactments appear to me to assume that for those costs the proctor has a "lien" or charge on the amount decreed, and to enact that that charge shall not be affected by a claim in reconvention or a set off. I do not see how any effect can be given to those enactments without holding that a proctor has such a charge. I therefore hold that a proctor has such a charge. . . ."

For the appellant it is contended that it is a necessary inference from the language of §§ 75 and 212 that the principles of the English common law as embodied in the Solicitors' Act[2] have been recognised and incorporated into our system, and that the proctor has a charge in the nature

1 (1907) 11 N.L.R.1, 2. 23 & 24 Vict 127

of salvage upon property recovered or preserved by him and we were referred to *Greer v. Young*[1]. *In re Suffield* [2] *Charlton v. Charlton*[3] and other cases cited in the Annual Practice.

It is true that §§ 75 and 212 assume the existence of the lien contended for only as regards costs directed to be paid by the decree. But assuming, as we are bound by the decision in *Perera v. Perera*[4] to assume, that a proctor possesses a lien on the fruits of litigation for costs decreed to be paid to his client, can a distinction be drawn between costs which the opposing party is ordered to pay to the proctor's client, and costs which the proctor is entitled to have taxed and to recover from his own client? It seems to me that such a distinction would be artificial and unfair. The lien which is recognised, not created, by §§ 75 and 212 can hardly be any other than the lien which is allowed by English law, a right, depending upon the principle that a proctor is entitled to a charge upon property recovered or preserved when meritorious services of the proctor result in such recovery or preservation.

It is difficult to think of any good reason why a plaintiff's proctor should be entitled to a charge for his costs when the action succeeds and the Court orders the defendant to pay the plaintiff's costs, but that he should not have such a charge if the defendant brings into court the amount claimed and so saves an order as to costs. In either case the principle of salvage is involved, for it is by reason of the proctor's service that the money has been made available. I would set aside the order of the District Judge and declare that the appellant has a charge, to the extent of his taxed costs, on the money brought into Court by the defendant. The appellant is entitled to the costs of this

1. *(1883) 24 Ch. D. 545.*
2. *(1888) 20 Q. B. D. 693.*
3. *(1883) 52 J. L. Ch .971.*
4. *(1907) 11 N. L. R. 1.*

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appeal and to costs of the application in the District Court.

Middleton J.

Middleton J.—This was an appeal against an order of the District Judge holding that the plaintiff's proctor had no lien for costs as against his clients upon a sum of R200 paid into Court by the defendant in satisfaction of the plaintiffs' claim in the action, on the ground that the Proctor had no lien against a creditor of his clients and that the Proctor's bill had not been taxed.

In the action itself the plaintiffs had been given judgment for the R200 paid into Court, but had been ordered to pay the defendant's cost, and the defendant's Proctor had taxed his bill and moved for a charging order on the money in Court and having subsequently obtained a writ seized the money in Court when the plaintiffs moved for and obtained discussion of the question of their Proctor's lien on the money in question, upon which the order appealed from was made, subsequently to this order the plaintiffs' proctor taxed his costs.

The Roman-Dutch law would not appear to give a proctor a lien on the instruments of the cause—presumably documents—except for expenses incurred on such documents, *Voet. 3, 1, 6; Thomson Vol. 1, p 536 ; Pereira, Vol. 2, p 486.* The decision however in *Anderson v. Loos.*[1] and §§ 75 and 212 of the Civil Procedure Code seem to recognise the Proctors' lien for costs both as regards documents and upon the amount of a decree, derived no doubt from the principles of the English common law on this question now embodied as regards a lien on a fund recovered in the Solicitor's Act 1860, section 28.

Kay L. J. in *ex parte Collier, In re Taylor*[2] quotes Sir Thomas Plumer as saying in 1820 (*Worrall v. Johnson*[3]) "there are two kinds of lien which a

1 (1892) 2. C. L. R. 66. 2 (1891) 1 Ch. 599.
3 1820 2 J. and W 214, 218.

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solicitor has for his bill of costs, one on the funds recovered and the other on the papers in his hands" . . . and the Lord Justice added that the lien extends to all those items which are properly included in the bill of costs, or as the learned Lord Justice amplified it, to all such claims against his client as the taxing master has a right to consider and if necessary moderate.

In *Mackenzie vs. Macintosh*, [1] it was held that a solicitor's lien on a fund recovered extends only to the costs of recovery of the particular fund, while a lien on documents may extend to all costs due to him from his client.

The wording of the sections of our Code in regard to the question before us is unfortunate, but in my opinion the reading suggested by Mr. Bawa is the correct one *i.e.*, that the words "under the decree" are both surplusage and out of place.

It is clear, no costs are ever decreed to be paid to a Proctor, and that the words "under the decree" are unnecessary even if they were placed following the word "decreed," but in that position they do no more than excessively emphasize and reiterate the preceding word.

I cannot see that the point raised by Mr. Jayewardene is applicable, *i.e.* that there must be a decree to create the lien. There is, in fact, a decree in the action itself to the effect that the sum brought into Court be paid by the defendant to the plaintiffs.

It must be remembered also that under the English law the right of lien is said to be a charge in the nature of salvage, *Greer v. Young*,[2] and applies to property of the proctor's client and sometimes even to money paid into Court for his benefit. *Hunt vs. Austin* [3]; *Emden vs. Carte*. [4] Under the

1. *64 L.T. 706 (C.A.)*
2. *(1883) 24 Ch. D. 545 (at p. 552)*
3. *(1882). 47 L.T. 300.*
4. *(1881). 45 L.T. 328.*

Rajapaksev Rajapakse

Middleton J.

decree in the action here the plaintiffs are held entitled to have the Rs. 200 paid out of Court to them. I cannot therefore see that it is proposed to extend the lien as against the creditor of the plaintiffs as the District Judge holds.

In *Perera v. Perera*[1] Hutchinson C.J. construed the words of §§ 75 and 212 as enacting that a proctor has a lien or charge on the amount decreed and that that charge was not to be affected by a claim in re-convention or a set off and that no effect could be given to the enactment unless it was held a proctor had such a charge. With his view not only do I entirely agree but we are bound by it.

Here the defendant seeks to set off his order for costs against the plaintiffs, as against the sum decreed by the Court to be paid by him to the plaintiffs, and I think § 212 preserves the plaintiff's proctor's lien on that sum.

As regards the Proctor's costs not having been taxed at the time the motion was made asserting the right of lien, I cannot see how this would prevent the right of lien arising, which apparently extends no further than for the amount of costs as taxed: *De Bay v. Griffin*[2]

In my opinion the order of the District Judge should be set aside and the motion of the plaintiffs and the proctor allowed to the extent of the taxed costs in this action for the recovery of the money now in Court.

The defendant must pay the costs of this appeal and of the discussion and order in the Court below.

Appeal allowed.

Proctor for appellants—*W. E. Weerasooriya.*

Proctor for respondents—*G. Ranasooriya.*

1. (1907) 11. N.L.R. 1. 2. (1875) L.R. 10. Ch. 291.

PRIVY COUNCIL.

COREA *v* ISERIS APPUHAMY *et al*

No. 3934, D. C. Chilaw.

Present: **Lord Macnaghten, Lord Mersey, Lord Robson.**

14th December 1911.

Co-heir—Unity of title and possession—Possession of one co-heir possession of all—Prescription—Legal title—Secret intention—Adverse Possession—Ouster.—Long-continued Possession—Presumption of ouster—Sec 3 Ord. 22 of 1871.

On the death of a person intestate his heirs have unity of title as well as unity of possession.

A person who enters into possession of immoveable property having a lawful title to enter cannot divest himself of that title by pretending that he had no title at all or by any secret intention in his mind. A co-proprietor's title enures to the benefit of all his co-proprietors and his possession is in law the possession of his co-owners.

A co-heir who has had undisturbed and uninterrupted possession for over ten years cannot acquire a title by prescription unless he gives proof of adverse or independent title. The title of a coheir is not independent. Nothing short of ouster or something equivalent to it could make the possession of co-owners adverse.

The principle laid down by Wood V. C. in *Thomas v. Thomas*[1] "Possession is never considered adverse if it can be referred to a lawful title" held applicable in Ceylon.

Semble, In certain circumstances a court might presume from long continued possession if undisturbed and uninterrupted that there had been an ouster or something equivalent to it.

The whole law of limitation is now contained in the Ordinance of 1871.

This was an appeal by the plaintiff in D.C. Chilaw 3934 to His Majesty in Council from a judgment of the Supreme Court dated the 26th May 1910 which affirmed a judgment dated the 15th August 1909 of the District Court dismissing plaintiff's action with costs.

1 2 *K. & J.* 1,38.

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The facts are fully stated in the judgment of the Privy Council.

Lawrence, K. C., *with him Dornhost, K.C., and Barrington-Wara*, for the plaintiff—appellant.

Atherley Jones, K.C., with *H.E. Miller* for the defendants-respondents.

Lord Macnaghten

Lord Macnaghten:—This seems to be a very plain case. The action out of which the appeal has arisen was an action for partition of certain lands, part of the estate of one Elias Appuhamy of Galmuruwa, in the district of Chilaw.

Elias died in July, 1878. He was never married and he died intestate. His heirs were his brother Iseris and three sisters. Taking by descent the heirs took as tenants in common in accordance with the provisions of Section 18 of the Partition Ordinance of 1863..

Elias came originally from Baddegama, in Galle district, about 120 miles from Chilaw. His father and mother and the rest of his family lived there apparently in somewhat humble circumstances. Elias prospered in Chilaw. After a time he was joined by his brother Iseris, who says that he left home alone when he was 10 years old, though he was probably three or four years older at the time. The two brothers kept a shop or store in Chilaw, in which they seem to have been jointly interested. But it is admitted that the lands in question in this action were the separate property of Elias.

At the time when Elias died Iseris was in jail under sentence of imprisonment for assault and robbery.

The property being thus left derelict, possession was taken by officials of the District Co urt. It must be presumed that such possession was taken for the benefit of the persons rightfully entitled.

Iseris came out of jail in December, 1878. Thereupon

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or soon afterwards, he entered into possession of the intestate's lands. The circumstances under which the officials of the Court relinquished possession in his favour do not appear in evidence. It seems, however to be immaterial whether there was an order of the Court on the subject, or whether the officials who must have known who Iseris was, and must have been aware of his relationship to the intestate, retired in his favour without any specific directions. The trial Judge says that they were "ejected" by Iseris, but no statement or suggestion to that effect is to be found in the evidence.

Some time after the death of Elias two of his sisters made their way to Chilaw. They seem to have been kindly treated by Iseris, who gave them small sums of money from time to time, and allowed them to obtain provisions from his shop without payment. Indeed, one of the sisters, named Balohamy lived for a long time in a house on Medawatta, which was one of the plots or parcels of land belonging to Elias and part of his estate.

In 1907 Iseris by deed settled the intestate's land on his son, reserving a life estate. This action on the part of Iseris was the talk of the neighbourhood. Balohamy, who was then the only survivor of the three sisters, became alarmed. Lawyers were consulted. Under their advice Balohamy brought an action for partition against Iseris. The action was confined to Medawatta, on the score, it was said, of expense, in order to save the stamp or fee which would have been payable if the whole estate had been the subject of the action. Then Iseris turned her out of her home. Being without means Balohamy and other co-proprietors in the same interest sold their rights or claims to the plaintiff Corea, who was Balohamy's legal adviser and advocate. He brought this action against Iseris. Iseris' son was afterwards made a party to the action.

Iseris in his defence claimed the benefit of Ordinance

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No. 22 of 1871, entitled "an Ordinance to amend the laws regulating the prescription of actions."

Lord Macnaghten.

It is not disputed that by that Ordinance, or by an earlier Ordinance of 1834 which was repealed by the Ordinance of 1871, the old law was swept away. The whole law of limitation is now contained in the Ordinance of 1871.

Section 3 enacts that "proof of the undisturbed and uninterrupted possession by a defendant in any action...... of lands or immovable property by a title adverse to or independent of that of the claimant or plaintiff in such action ...for 10 years previous to the bringing of such action shall entitle the defendant to a decree in his favour with costs." The section explains what is meant by undisturbed and uninterrupted possession. It is "possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred." Then follows an analogous provision in favour of a plaintiff claiming to be quieted in possession of lands or other immovable property under similar circumstances.

In the present action the plaintiff Corea offered some evidence tending to prove that Iseris took out administration to Elias. There certainly was a testamentary case in the District Court relating to the intestate's estate. But the record of the case is missing, and it is not clear whether the case was concerned with an application by officials of the Court or with an application by Iseris for administration. The District Judge held that it was not proved that Iseris took out administration to his brother's estate.

The plaintiff also endeavoured to prove that Iseris had acknowledged the title of his co-proprietors within ten years of the commencement of the action. On this point, also, the District Judge was against the plaintiff.

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Their Lordships accept the decision of the District Judge on these two points. In their Lordships' opinion they are not material to the real question at issue. Assuming that the possession of Iseris has been undisturbed and uninterrupted since the date of his entry the question remains: has he given proof, as he was bound to do, of adverse or independent title? His title certainly was not independent. The title was common to Iseris and to his three sisters. On the death of Elias his heirs had unity of title as well as unity of possession. Then comes the question: was the possession of Iseris adverse? The District Judge held that Iseris "entered in the character of sole heir or plunderer." "Whichever it was," says the learned Judge, "so he continued, and acknowledged no title in any one else. He has acquired a good prescriptive title." It is difficult to understand why it should be suggested that Iseris may have entered as "plunderer." He was not without his faults. He is described by the learned Judge who decided in his favour, as "a convicted forger and thief," and "expert not only in crime and incarceration but also in perjury." But it is perhaps going too far to hold that he was so fond of crooked ways and so bent on doing wrong that he may have scorned to take advantage of a good legal title and may have preferred to masquerade as a robber or a bandit and to drive away the officers of the Court in that character. It is not a likely story. But would such conduct were it conceivable, have profited him? Entering into possession, and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-proprietors. The principle recognised by Wood, V. C., in *Thomas v. Thomas*,[1] holds good: 'Possession is never considered adverse if it can be referred to a lawful title.'

The two learned Judges in the Court of Appeal did not adopt in its entirety the suggestion of the trial Judge. They

[1] *2 K. & J. 79, 83.*

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Lord Macnaghten.

both held that Iseris entered as "sole heir," and that his title has been adverse ever since he entered. They held that he entered as "sole heir," apparently because he had it in his mind from the first to cheat his sisters. But is such a conclusion possible in law? His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. There is no provision in the Ordinance of 1871 analogous to the enactment contained in Section 12 of the Statute of Limitations, 3 and 4 Will. IV. c. 27, which makes the title of persons "entitled as co-partners joint tenants or tenants in common" separate from the date of entry. Before that Act was passed it was a settled rule of law, that the possession of any one of such persons was the possession of the other or others of the co-proprietors. It was not disputed at the Bar that such is now the law in Ceylon.

The learned counsel for the respondent, who argued the case with perfect candour, and said all that could be said on behalf of his client, did not of course, question the principle on which Wood, V.C., relied in *Thomas v. Thomas.*[1] His submission was that the Court might presume from Iseris' long-continued possession, undisturbed and uninterrupted as it was, that there had been an ouster or something equivalent to ouster. No doubt in former times before the statute of William IV., when the justice of the case seemed to require it, juries were sometimes directed that they might presume an ouster. But in the present case the learned Judge did not make any presumption of that sort. Nor indeed did Iseris before this action was brought attempt to rely on adverse possession. His pretence was that he was sole heir. In the first partition action he swore that he did not know the name of his father or that of his mother. He swore that Balohamy was only a cousin; he knew nothing, he said,

1 *2 K. & J. 79, 83.*

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about his family except that he was the only brother of Elias. For this audacious statement he was indicted for perjury at the instance of the Judge. He was convicted and sentenced to fine and imprisonment. The Judge who pronounced sentence observed : "It is clear that he was determined to prove that he was the sole heir, and strenuously to deny anything that might count against him." Be that as it may, this is not a case in which the circumstances could justify the presumption of ouster in favour of such a man as Iseris.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, the judgment of the Supreme Court and the judgment of the District Judge set aside, with costs in both Courts, and decree made for partition of the lands which on the death of Elias passed by descent to his heirs. The respondents will pay the costs of the appeal.*

Appeal allowed.

Solicitors for Appellant—*Blyth, Dutton, Hartley & Blyth.*
Solicitors for Respondent—*Surridge & Mullis.*

* The following is the argument of Counsel, as reported in (1912) A.C. p. 232 :—

P. O Lawrence, K.C., Dornhorst, K.C., and *Barrington-Ward* for the appellant, contended that on the evidence the first respondent's possession was throughout permissive and precarious and was held as co-owner on behalf of himself and his co-owners. In Ceylon a co-owner cannot acquire a title to land by prescription against the other co-owners. They referred to Ordinance 22 of 1871 Sections 2 and 3. The English Act 3 and 4 Will. 4, c. 27, which by Sec. 12 dealt with co-owners' rights, did not apply to Ceylon. The English Law before that section and Ceylon Law recognized that possession by one co-parcener was possession by all. The strongest evidence should be given of a distinct claim by the defendant to hold adversely to his co-heirs persisted

in to their knowledge. He must show that he held by a title adverse to and independent of the plaintiff. Reference was made to *Darby and Bosanquet's Law of Limitation* 2nd ed. p 377 : *Culley v Doe d. Taylerson*[1] ; a judgment of Bonser C. J. in an unnamed case[2] ; *Punchirala v. Ram Menika*[3] ; *Amereseker v. Ram Menika.*[4]

Atherley-Jones, K. C., and *Horace Miller*, for the first respondent, Iseris Appuhamy, contended that the evidence proved that he had been in undisputed possession for more than the statutory period *ut dominus* and without any acknowledgment direct or indirect of a title under which the appellant could claim. He entered into possession as sole heir to Elias and by a long series of acts known to the appellant's vendors, exercised all the rights of sole and beneficial owner during the whole period of his possession, which lasted for about thirty years. Evidence of actual ouster or its equivalent was not necessary ; if it were it might be presumed from the conduct of the parties. They referred to *Naguda Marikar v. Mohammadu*[5] and *Terunnanse v. Menike.*[6] It was contended that the law of Ceylon was analagous to the English Law as laid down in 3 and 4 Will. 4, c. 27, Sec. 12 and reference was made to *Hobbs v. Wade.*[7]

Counsel for the appellant were not heard in reply.

ABEYESEKERA *v.* SILVA.

No. 8,233 C. R. Balapitiya.

Present : **Wood Renton, J.**

20th December 1911.

Partition—Lease of an undivided share pending partition—Alienation—Void—Sec. 17 of Ord. 10 of 1863.

A lease of a share of a land which is the subject matter of partition proceedings, during the pendency of such proceedings, is void.

1 (1840) 11 Ad and E 1008
2 (1899) Koch's Rep 61, 62
3 (1878) 1 Ceylon S.C R. 64.
4 (1897) 3 Ceylon N.L.R. 137.
5 (1903) 7 Ceylon N.L.R. 91
6 (1895) 1 Ceylon N.L.R. 200
7 (1887) 36 ch. . 553

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The principle that a lease is a *pro tanto* alienation ought not to be limited to the special kind of ownership involved in a possessory action brought by a lessee, but is a general principle applicable to all cases.

Goonewardene v. Rajapakse[1] followed.

"Undivided" in § 17 of Ordinance 10 of 1863 must be taken to mean undivided in the eye of the law.

The facts are set out fully in the judgment of Wood-Renton J. as follows :—

"The questions for decision in this case arise under the following circumstances. One Simon de Silva Wijesekera instituted an action for the partition of the land described in the appellant's plaint on the 25th June 1908. The preliminary decree was entered on the 10th February 1909. On the 24th December 1908 Wijesekera granted a mortgage of an undivided share of the land in question to the lessor of the defendant-respondent. On 2nd September 1909 he leased to the plaintiffs-appellants $\frac{1}{3}$ share for five years. Final decree in the partition case and the mortgage decree in favour of the defendant respondent were entered up on 1st December 1909. The plaintiffs appellants rely on their lease; the defendant-respondent on his mortgage. The property was seized under the mortgage decree on 7th December 1909. The lease to the appellants was registered on 14th December 1909. The seizure under the mortgage decree was registered on 15th December. There was a sale under the mortgage decree and purchase by one James on 15th June 1910 and a Fiscal's transfer was issued on his favour on 24th October 1910. James leased to the respondent on 26th April 1911 and his Fiscal's transfer was registered on 13th June 1911. The learned Commissioner of Requests in a contest between the appellants and respondent has held that the deeds on which they both rely are void, having been executed by Simon Wijesekera after he had instituted partition action and before final decree had been entered up. He has accordingly dismissed appellants' action with costs

1. (1895) *1 N. L. R. 217.*

and the present appeal is brought against the decree in which that decision has been embodied.

Bawa K.C. for the plaintiffs-appellants.—A lease is not an alienation and therefore § 17 of the Partition Ordinance does not apply. The term "alienation" as defined in *Stroud's Judicial Dictionary* cannot be taken to include a lease. Voet defines "alienation" as every act by which dominium is transferred. *See Jayewardene on Partition p. 91.* Under a lease no dominium passes to the lessee and the lessor is still the owner of the property. No doubt a lease was held to be a *pro tanto* alienation (*Goonewardene v. Rajapakse*[1]) but that was for the purpose of giving the lessee the rights of a possessor and such finding should be restricted to possessory actions. The lease although made before the final decree is of a divided share and § 17 prohibits only an alienation of undivided shares. In *Appuhamy v. Punchi Banda*[2] it was held that an alienation during the pendency of a partition suit of a share or interest to which a person may become entitled under the final decree is not obnoxious to § 17. Applying that reasoning the present lease even if an "alienation" would be valid. Sec. 13 has made special provision in the case of a lease. [*Wood Renton, J.*—But that refers to leases in existence before the partition suit was instituted.]

Wadsworth for the Respondent.—The decision in *Goonewardene v. Rajapakse*[1] lays down a general principle as appears from the judgment of Bonser C. J.; this case has been followed in a number of later cases. The principle cannot be restricted to possessory actions. The lease in the present instance is of a divided share of the land—a lease of an entity which at that time had no existence as the land was still undivided, therefore it is invalid. The decision in *Louis Appuhamy v. Punchi Banda*[2] does not apply to the present case as the lease here is not

1 (1895) 1 N. L. R. 217 2 (1904) 10 N. L. R. 196.

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of the rights or interests which might be allotted to the lessor under the decree.

A. St. V. Jayewardene (as *amicus curiæ*) in reply.—The absence of decisions on this point shows that a lease does not come within the purview of § 17. The object of the prohibition in § 17 is to prevent interventions in and interference with partition proceedings by persons who had acquired title to shares in the land after the commencement of the action; but a lease has no such effect, it is a mere mode of possessing the property. If it were held otherwise absentee owners would find it impossible to possess their properties. Where a statute creates a prohibition, the prohibition should be strictly construed and should not be extended by analogy. If the framers intended to include a lease nothing would have been easier than to add the word "lease" especially as they have included the word "mortgage". A decision that a lease is an alienation would entail considerable hardship on the owners of property.

Wadsworth. If the reason given by counsel is correct, how is it that persons who purchase property at Fiscal's sales during the pendency of partition proceedings are allowed to intervene? * *C. A. V.*

Wood-Renton, J.—(after having set out the facts as above, continued):—There has been no contention here that the mortgage in favour of the Defendant-Respondent was invalid. We are concerned only with the question as to the lease in favour of the appellants, and the point for determination is whether it is void in view of the provisions of section 17 of Ordinance No. 10 of 1863. The appellants' counsel argued that that section did not apply on two grounds; in the first place, that for the purposes of Ordi-

* See *Hukm Chand's Res Judicata p. 723*:—"The pendency of a suit for the partition of land does not withdraw the land which is sought to be partitioned from the reach of an execution at law against the interest of a part owner." Otherwise a debtor by instituting partition proceedings might delay his creditors indefinitely.—EDITORS.

nance No. 10 of 1863, a lease is not an alienation, and in the next place, apart from that, that section 17 applies only to undivided interests, and that it appears from the terms of this lease itself that it dealt with a defined portion. I have carefully examined the authorities which were cited to me in the course of the argument and it appears to me that the principle laid down by the Supreme Court in the case of *Goonewardene v. Rajepakse*[1] a principle which has been followed in many later decisions—that a notarial lease is a *pro tanto* alienation—ought not to be limited to the special right of ownership which was directly involved in the case just referred to, namely, the bringing by the lessee of a possessory action. It appears to me that it is because a notarial lease is a *pro tanto* alienation that the court held in *Goonewardene v. Rajapakse*[1] that the lessee was entitled to the ordinary legal remedies of an owner and possessor. I do not think that the English cases as to the meaning of the word "alienation" can give us much help in interpreting the term here in Ceylon. I hold that the first point taken in favour of the appellants fails. The second point depends on the meaning that we attach to the word "undivided" in section 17 of Ordinance No. 10 of 1863. I was impressed in the course of the argument by the decision of the Supreme Court in the case of *Louis Appuhamy v. Punchi Banda.*[2] It was there held that a sale or mortgage executed during the pendency of a partition suit in respect of a share or interest to which a person may become entitled after the termination of such suit is valid, and is not affected by section 17 of Ordinance No. 10 of 1863. "I do not think," said Sir Charles Layard in that case, "that that section was "intended to embrace or affect or to hinder or prevent "persons from alienating or mortgaging the right to which "they might become entitled after a partition had been "decreed in respect of the land, the subject of partition suit "to which they were parties." On further consideration, however, it seems to me that that decision cannot help the

1 (1896) 1 N. L. R. 217. 2 (1904) 10 N. L. R. 196

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appellants here. The share referred to would be a divided share at the time when the sale or the mortgage became effective. In the present case while the lease speaks of the subject matter of the letting as a defined portion, it was still, I think, "undivided" within the meaning of section 17 of Ordinance No. 10 of 1863. In my opinion, the word "undivided" for the purpose of that section must be taken to mean undivided in the eye of the law. I have not been able to obtain any direct authority to guide me in the decision of this case. But I have considered all those that were cited, and have come to the conclusion that the appeal should be dismissed with costs

Appeal Dismissed.

Proctor for Appellant—*B. Amarasekera.*

Proctor for Respondent—*W. E. de Silva.*

GOONETILLEKE *v.* SAINERIS

No. 15876 P. C. Negombo.

Present: **Wood Renton, J.**

12th October, 1911.

Arrack—Possession of less than two quarts—§ 32 & 33 of Ordinance 10 of 1844.

The possession of less than two quarts of spirits is not an offence under § 32 of Ordinance 10 of 1844,

In this case the accused was convicted under § 32 of Ordinance 10 of 1844 of having possessed 9 gills of arrack, not legally sold to him by the licensed retail dealer and was ordered to pay a fine Rs. 50. He appealed.

De Alwis (with *de Zoysa*) for the accused-appellant.—Although the Ordinance is silent on the point, § 33 seems to imply that the removal of less than 2 quarts of arrack without a permit may be done without any offence being committed. The whole Ordinance must be read together. In *Endoris de Silva v. Shona*[1] it was held that possession of arrack in less quantity than 2 quarts is not an offence under § 32.

1. (1876) *Ram. 1872—1876, p. 316.*

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Walter Pereira, K.C.; S. G. was heard contra as *Amicus Curiæ.*

Wood-Renton, J.

Wood-Renton, J.—The accused appellant has been convicted under section 32 of Ordinance No. 10 of 1844, of having possessed 9 gills of arrack, not legally sold to him by a licensed retail dealer, and has been ordered to pay a fine of Rs. 50. It was argued on behalf of the appellant that the conviction was bad on the ground that the possession of less than two quarts of spirits is not an offence under section 32 of the Ordinance of 1844. After hearing his counsel, and the learned Solicitor General as *amicus curiæ*, I feel bound to uphold this contention. Section 32 itself says nothing as to the quantity of spirits, the possession of which is unlawful unless it can be brought within one of the exceptions which are embodied in the section. It was held, however, in the case of *Endoris de Silva v. Shona*,[1] that possession of arrack in less quantity than two quarts is not an offence within the meaning of section 32 of Ordinance 10 of 1844. I am not aware of any other authority directly in point. But that case is one of old standing, and I think that I ought to follow it. I am all the more disposed to do this because section 33 of the Ordinance allows, by implication, arrack in any quantity not exceeding two quarts to be removed without a permit, and thereby seems to imply that such a quantity of arrack may be possessed without any offence being committed. I set aside the conviction and sentence and direct the acquittal of the accused.

Conviction quashed.

Proctor for Appellant.— *D. J. S. Gunewardene*

1. (1876) *Ram. 1872—1876, p. 315.*

WIJESOORIYA *v.* MEPI NONA

No. 8919 D. C. Galle.

Present :—**Middleton & Wood Renton, J.J.**

5th February 1912.

Costs—Several defendants employing one Proctor—Defences separate—Right of proctor to recover costs from each defendant—One defendant successful—Liability of plaintiff to pay costs to successful defendant.

When two defendants supporting their defences entirely independent of each other employ the same proctor, each defendant would be separately liable in costs to the Proctor ; and, if judgment is given in favour of one defendant with costs against the plaintiff such defendant is entitled to recover from the plaintiff the full costs to which he has been put in defending the action.

Abdul Rahim v. Ameresekera,[1] distinguished.

Per Middleton, J.—The criterion of liability to the defendants in whose favour the order for costs is made is the liability of the defendants themselves to their proctor.

In this case the 1—7 defendants-appellants were sued by the plaintiff for a partition of land, the appellants objecting to the inclusion in the partition of a lot marked B. The appellants were represented by a proctor who was subsequently retained for the 16th defendant who had been added as a party on the ground that he claimed a planter's interest in the land and whose claim was independent of that of the other defendants. The Court dismissed the action and ordered the plaintiff to pay the costs of the 1—7 defendants, and the 16th defendant to pay the costs of the plaintiff. Upon taxation of costs the plaintiffs objected on the authority of *Abdul Rahiman v. Amerasekera*[1] that 1—7 defendants were only entitled to pay half their costs against them, and the District Judge upheld this view against which the 1—7 defendants appealed.

Bawa K. C. for appellants.—This is not a case of joint defence. Our claim to costs should not be affected by the conduct of the proctor in allowing himself to be retained by parties who had nothing to do with us. *Abdul Rahiman v.*

1. *(1911) 14 N. L. R. 226.*

Amarasekera [1] would not apply, see *Beaumont v. Senior and Bull* [2].

Wadsworth for respondent.—The true test is in what amount is a party liable to his proctor [*Wood Renton J.* Suppose three persons retain the same proctor at three different times in the course of a case, would they not each be liable to the proctor in the full amount of costs?] *Abdul Rahiman v. Amarasekera* says that they would be liable only in the absence of any agreement [*Wood Renton J.* But here there was no agreement]. It is submitted that a proctor who allows himself to be retained by more persons than one should not be allowed to recover full costs from each of them.

c. a. v.

Bawa K. C. in reply

Middleton J. (after stating the facts said): The principle laid down in *Beaumont* v. *Senior and Bull* [2] upon which the decision in *Abdul Rahiman* v. *Amarasekera* [1] is founded is that a successful defendant is entitled to recover from the plaintiff the costs he has incurred in defending the action, and that those costs must depend on the liability of the defendants to their proctor.

If two defendants supporting a similar defence employ one proctor and have no agreement as to how the costs are to be borne I think on the authority of the case cited that each of the defendants is liable to their proctor for half the costs of the defence and that would be the amount which the plaintiff would have to pay the successful defendant. If however two defendants are supporting their defences entirely independent of each other it seems to me that though each has employed the same proctor the liability of each to the proctor may be distinct and separable.

Here the 16th defendant though he supported the 1—7 defendants' defence, yet got himself added on the ground that he had a planter's interest. The District Judge's order was

1, (1911) 14 N. L. R. 226. 2, (1903) 1 K .B. 282.

Wijesooriya v. Mepi Nona.

Wood Renton, J.,

that where the proctor and advocate appeared for the 1—7 defendants solely the full costs of their appearance were to be paid by the plaintiff, but if they appeared for all the defendants then the plaintiff was to pay only half the fees. This does not seem to me to be in accordance with the ruling of this Court in *Abdul Rahiman v. Amerasekera.*[1]

The criterion of liability to the defendants in whose favour the order for costs is made is the liability of the defendants themselves to their proctors.

The 1—7 defendants whose defence was put forward entirely independent of the 16th defendant though it happened to be the same, would be liable to their proctors quite separate from the 16th defendant, and to this extent they are liable to their proctors for taxed costs and would be liable to claim such costs on taxation against the plaintiff.

I would therefore vary the order of the District Judge by directing that the 1—7 defendants be entitled to be paid by the plaintiff all such costs as are properly payable by the 1—7 defendants to their proctor and advocate in defending the action quite apart from the retainer by the 16th defendant of the same legal advisers.

The appellants will have the costs of the appeal and of the proceedings upon taxation and review in the District Court.

Wood Renton J.—The question at issue in this case is whether the learned District Judge has rightly applied the principle laid down by the Supreme Court in the case of *Abdul Rahiman* v. *Amerasekera* [1], following the case of *Beaumont v. Senior* [2], to the circumstances of the present case. In those cases two sets of defendants jointly retained, and were jointly represented by, the same proctors and solicitors respectively for the purpose of the trial. It was held that where judgment was given in favour of one defendant and against the other, the successful defendant was, in the

1. *(1911) 14N. L. R. 226.* 2. *(1903) 88 L. T. 234*

absence of any agreement between him and his co-defendant as to how their costs were to be borne *inter se*, entitled to recover from the plaintiff half the costs of the defence.

In my opinion that principle has no application to a case like the present where, although the appellants and the added defendant were in fact represented at the trial by the same proctor, they did not retain him jointly nor were they in any sense acting jointly in their defence. I agree to the order proposed by my brother Middleton.

Appeal allowed.

Proctor for Appellant—*W. E. Weerasooriya.*
Proctor for Respondent—*Sam. Weerasooriya.*

MODDER *v.* SILVA.

No. 11,935 P. C. Kurunegalle.

Present: **Wood Renton, J.**

26th February 1912.

Unlawful Game of skill—Playing for a Stake—Element of chance—Gaming—Gaming Ordinance 17 of 1889 Sec. 5 (a.)

Playing a pure game of skill, where it is for a stake is unlawful gaming within the meaning of Sec. 5 (a) of Ord. 17 of 1889.

The essence of the offence of gaming is the existence of a stake for which the parties play.

There is no provision in Ord. No. 17 of 1889, which makes "chance" a necessary element of unlawful gaming.

In this case the accused was convicted under Sec. 5 (a) of Ord. 17 of 1889 of keeping a common gaming place and sentenced to pay a fine of Rs. 25. The game is thus described:- Rings were thrown on a slanting table to which 153 ten cent pieces and 4 fifty cent pieces were attached. One cent was payable for each throw. If the ring enclosed a coin, the thrower became the winner of the coin enclosed. The learned Police Magistrate held that this was a pure game of skill but he convicted the accused holding that the game was played for a stake. The accused appealed.

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Balasingham for appellant.—The staking of money does not render a pure game of skill unlawful under the Ordinance, (see *Ramanathan's Reports 1877 p. 83* and the judgment of Cockburn C. J. in the case of *Bew v. Harston.*[1]) As a matter of fact, money was not staked on this occasion. The facts show that the accused offered a certain sum of money if the ring fell at a certain place. This clearly amounts to playing on credit which is not an offence under the Ordinance (see *Puhaitamby v. Carolis* [2] and *Perera v. Siddi appu*[3].

Akbar C. C. for the Respondent.—The case in *Ramanathan's Reports* was decided under Sec. 4 (4) of Ordinance 4 of 1841, which prohibits games of chance only. This sub-section was repealed by Ord. 17 of 1889, which, in its turn, prohibited gaming for a stake irrespective of the nature of the game, namely whether it was a game of skill or a game of chance or of mixed chance and skill (see Sec. 3, definitions of "Common Gaming place" and "Instruments and appliances of gaming"). The English cases show that the statute corresponding to Ord. 17 of 1889 prohibited games for stakes and had for their object the prevention of shady characters congregating in undesirable places (See *Lockwood v. Cooper* [4], *Dyson v. Mason*,[5] *Jenks v. Turpin* [6]) As regards the question whether the present case is one of a game for a stake or not, the accused's own statement shows that when the ring encloses any of the coins on the table it becomes the property of the thrower. This case is not one of betting on credit Here the stakes were actually put down before the play commenced.

Mr. Tambiah as *amicus curiae* referred the court to the case of *Ahmed Khan v. Emperor.* [7]

Wood Renton J.—The accused-appellant was convicted in the Police Court of Kurunegalle of having kept a room, of which he was the occupier, as a common gaming

1. *(1878) 3 Q. B. D. 455.*
2. *(1893) 2 S. C. R. 62.*
3. *(1893) 2 S. C. R. 75.*
4. *(1903) 2 K. B 428.*
5. *(1889) 2 Q. B. D. 353.*
6. *(1884) 13 Q. B. D. 505.*
7. *(1911) 12 Cr. Law Journal of India 612.*

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place, and of having thereby committed an offence punishable under section 5 (a) of Ordinance No. 17 of 1889. The Police Magistrate has sentenced him to pay a fine of Rs. 25. It is not disputed that the appellant was the occupier of the house in question, or that, if the game alleged to have been allowed to be played on the premises is one of a class against which the Ordinance is directed, the room so used was a common gaming house. The game was thus described in effect by the appellant himself in his evidence at the trial, The principle of play was to throw rings on a slanting table to which 153 ten cent pieces and four fifty cent pieces were affixed. One cent was payable for each throw. If the ring enclosed a coin, the thrower became the winner of the coin enclosed. The learned police Magistrate held that this was a pure game of skill, and I will decide the present appeal on the footing that that finding is correct, although I find in the case of *Ahmad Khan v. Emperor*, [1] to which I have been kindly referred by Mr. Tambyah as *amicus curiae*, that two judges of the High Court of Allahabad held that the element of chance in a game consisting of throwing a ring over a pice is so strong that the game cannot be held to be a mere game of skill. The question for decision is whether the learned Police Magistrate's interpretation of the law in the present case is correct. It was held in *P. C. Jaffna No. 2838* [2] that for the purpose of section 4 of Ordinance No. 4 of 1841, a game is not unlawful where it is one of skill alone. I do not think, however, that that decision can be made to apply to a prosecution under section 5 of Ordinance No. 17 of 1889. The language of section 4 (4) of Ordinance No. 4 of 1841 by clear implication makes chance a necessary element of an unlawful game. There is no provision to that effect in Ordinance No. 17 of 1889. The essence of the offence of gaming, as defined by that Ordinance, is the existence of a stake for which the

1. (1911) 12 Crim: Law Journal of India, 612.
2. (1877) Ram: 83.

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parties play (see *Puhaitamby v. Karolis* [1] and *Perera v. Siddiappu.*[2])

Wood Renton, J.

On the showing of the appellant himself a stake was clearly played for in the present case. The view of the law that I am taking here is confirmed by English decisions. It was held by Lord Campbell C. J. and Coleridge, Wightman, and Erle J. J., as far back as 1852, in *Regina* v *Ashton* [3] that the object of the analogous English statute, 9 George IV, C. 16, section 21, was to prevent the contracting of bad habits by the practice of games where money was staked in public houses. "If money were staked" said Lord Campbell that would "be gaming". This decision was followed by Mellor J. in *Bew* v *Harston* ; [4] although Sir Alexander Cockburn C. J. in the same case, doubted its correctness. In *Dyson v Mason* [5] Huddleston. B. and Wills J. said Cockburn C. J's view was unsupported by any other authority, and held that playing any game for a stake is unlawful. The only authority in support of a contrary view that I am aware of, is the case of *Hari Sing* v. *Emperor*,[6] to which Mr. Tambyah has also referred me, where it was held that if a game is one of skill the playing of it is not an offence under the Indian Gaming Act of 1867. The judgment is a short one. None of the English cases to which I have referred are mentioned in it, and I am not prepared to follow it. The appeal is dismissed.

Appeal dismissed.

Proctor for appellant—*P. Tambirajah.*

1. (1893) 2 S C. R 62.
2. (1893) 2 S. C. R. 75.
3. (1854) 1 E. & B. 286.
4. (1887) 3 Q. B. D. 455.
5. (1889) 2 Q. B. D.353.
6. (1907) 6 Crim: L. Journal of India, 421.

SEKAN MARIKAR v. GODAGE.

No. 6681 C.R. GALLE.

Present: **Wood Renton J.**

23rd November 1911.

Fiscal's conveyance—mortgage action—mortgage decree—simple money decree—purchaser at Fiscal's sale—relation back of title—notice of action —seizure not an encumbrance—registration of assignment of mortgage—Civil Procedure Code § 289, 643, 644.

A person who has purchased property at a Fiscal's sale but has not obtained a transfer has no title and is not entitled to have notice of an action which a mortgagee of such property is bringing to enforce his bond.

The true date of the purchase under a Fiscal's sale is the date of execution of the Fiscal's conveyance and § 289 of the Civil Procedure Code has not the effect of making the purchaser's title on the execution of that conveyance relate back to the date of the actual sale for the purposes of §§ 643, 644 of the Civil Procedure Code.

A Fiscal's seizure is not an encumbrance within the meaning of § 643 of the Code.

The registration of the assignment of a mortgage bond is sufficient to cure the omission to register the bond itself.

Peiris v. *Perera*[1] followed.

This was an action rei-vindicatio. The plaintiff respondent sued the defendant appellant for declaration of title to a $\frac{1}{4}$ share of a field. The plaintiff purchased the share at a Fiscal's sale held in execution of a simple money decree against one Samsy Lebbe who owned a half share of the field jointly with one Kadija Umma. The sale took place on the 5th Nov. 1910, the seizure having been registered on the 19th Oct. 1910 and the Fiscal's conveyance was issued to the plaintiff on the 25th March 1911. Previous to the seizure and sale Samsy Lebbe and Kadija Umma had mortgaged a half share including the share in question to Dawudu Marikar. The mortgage bond was not registered. Dawudu by deed of assignment dated 5th June 1903 and registered 24th July 1903 assigned the mortgage to one Ahamadu Ismail, who by deed of assignment dated 29th

[1. (1906) 10 N.L.R. 33.]

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July 1910 and registered 25th Oct. 1910 assigned it to Uduma Lebbe Marikar. The latter put the bond in suit on the 12th Nov. 1910 making only the debtors parties to the action, and obtained a hypothecary decree. The field was thereafter sold under the decree and the defendant became the purchaser of the ¼ share of Samsy Lebbe; Kadija Umma having died in the meantime. The Fiscal's sale took place on the 7th February 1911 and the Fiscal's conveyance to the defendant was issued on the 30th June 1911. The plaintiff who could not obtain possession of the field sued the defendant for declaration of title. The commissioner held that on the obtaining of the Fiscal's transfer by the plaintiff his title related back to the date of the sale and therefore he was entitled to notice of the mortgage action and that without such notice he was not bound by the hypothecary decree. He accordingly gave judgment for plaintiff. The defendant appealed.

A. St. V. Jayewardene, for the defendant-appellant.—At the date of the institution of the mortgage action the plaintiff had no right or title to the property and the property was still vested in the judgment debtor. The plaintiff was never in possession, so that having neither title nor possession he was not entitled to be made a party to the action. The registration of the assignment of a mortgage bond is sufficient to cure the omission to register the bond itself: *Peiris v. Perera*[1] and *Silva v. Gomis.*[2] The mortgage bond having been registered the defendant who bought under that decree had a superior title. In *60 D. C. (Inty) Matara*[3] which is on all fours with this case the same principle was upheld.

H. A. Jayewardene for the plaintiff-respondent.—The plaintiff is not bound by the mortgage decree as he was not made a party to the action. The defendant could make the plaintiff's title subject to his only if he complied with §§ 643 and 644 of the Code. The defendant cannot claim the bene-

1. (1906) 10 N. L. R. 33. 2. (1909) 1 Cur. L. R. 96.
3. S. C. Min: 22nd June 1910.

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fit of these sections as the deed of mortgage itself had not been registered and the mortgagee's address had not been registered for service of notice. The registration of the assignments is of no avail under these sections as they require the original deed itself to be registered. The facts of the Matara case are different.

A. St. V. Jayewardene in reply:—§§ 643 and 644 have no application because at the date of institution of the action the plaintiff was not a puisne incumbrancer and he had no "deed" in his favour, § 643 requires notice of action to be given to "all grantees, mortgagees, lessees, and other encumbrancers whose *deed* of conveyance ... or other incumbrance shall be of date subsequent. . "

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Wood Renton J.—The plaintiff respondent bought a ¼th share of a field called Ama Lebbege Wela at a sale in execution against one Samsy Lebbe, who owned ½ share jointly with Kadija Umma, on a money decree. The sale took place on 5th November, 1910, but the respondent did not obtain a fiscal's transfer till 25th March 1911. The seizure of the property had been registered on 19th October 1910. Samsy Lebbe and Kadija Umma, however, had previously mortgaged the share in question to one Dawudu Marikar, who assigned it by deed dated 5th June 1903, and registered on 24th July, 1903, to Ahamado Ismail. Ahamado Ismail assigned the mortgage by deed, dated 29th July 1910 and registered on 25th October 1910, to Uduma Lebbe Marikar. He sued the debtors on the mortgage bond on 12th November, 1910, obtained a hypothecary decree, and the land was sold under the writ on 7th February 1911 to the appellant, who obtained a fiscal's transfer on 30th June, 1911. Kadija Umma was dead before the mortgage decree was entered. In the present action the respondent sues the appellant, claiming a declaration of title to the share above mentioned. The case went to trial on three issues:—

(1.) As plaintiff's seizure was registered and as plaintiff

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had no notice of the action on the mortgage bond, is plaintiff bound by the hypothecary decree?

(2) As Kadija was dead before decree entered (this is admitted so far as regards the purposes of this issue only) is the decree against Samsy Lebbe also bad?

(3.) As the mortgage bond is not registered, does the mortgage prevail against the seizure.

It was admitted on the first issue that the address of the mortgagee had not been registered under § 644 of the Civil Procedure Code. The learned Commissioner of Requests held that whenever the plaintiff respondent obtained his Fiscal's transfer, his title to the land dated back to the date of the sale, and that he was consequently entitled to notice of the action on the mortgage bond before any mortgage decree could be enforced against him. Admittedly such notice was not given. It appears to me that the case of *60 D.C. (Inty) Matara*[1]—a decision of two Judges, which is therefore, binding upon me—is an authority against the view of the law on which the learned Commissioner of Requests has acted in regard to the first issue. It was held in that case, under circumstances practically identical with those of the present case, that the true date of the purchase was the date of the execution of the Fiscal's conveyance, and that § 289 of the Civil Procedure Code had not the effect of making the purchaser's title on the execution of that conveyance relate back to the date of the actual sale, for the purposes of §§ 643 and 644 of the Civil Procedure Code.

The respondent's Counsel argued that the defendant appellant was not in a position to claim the benefit of the provisions of those sections in as much as his own mortgage was not registered, and that the seizure of the property was an "encumbrance" within the meaning of the sections in question. In my opinion, a seizure cannot be brought under the words "encumbrance" in section 643. I think

1 *S. C. Min: 22nd June 1910.*

that the words "deed of" which precede "conveyance" in § 643, must be taken also as governing the subsequent words "mortgage, lease, or other encumbrance" This is made clear by the later clause in the same section that they have duly registered "their deeds". If that construction of § 643 is right, a seizure is clearly not an encumbrance It results from what I have just said that at the time the mortgage bond was sued upon, the plaintiff respondent had no title to the property in suit which made it incumbent that he should have notice of that action, and sections 643 and 644 of the Civil Procedure Code do not apply to the present case at all.

The Commissioner of Requests rightly held on the second issue—and the soundness of his judgment on this point was not challenged in appeal—that the death of Kadija Umma before the mortgage decree was entered did not affect its validity as against the debtor who was alive at the time, and on the third issue—for the reasons stated above, that no question of registration of addresses under § 644 of the Civil Procedure Code arose. Under the ordinary law the registration of the assignments of the mortgage bond relied on by the defendant appellant is sufficient to cure the omission to register the mortgage bond itself: *Peris* v. *Perera* [1] *and Silva* v. *Gomis* [2]

The plaintiff respondent's action must be dismissed with the costs of the action and of the appeal.

Proctor for appellant—*C. L. Wickremasinghe.*
Proctor for Respondent—*E. A. Wijesuriya.*

[1] (1906) 10 N. L. R. 33 [2] (1909) 1 Cur. L. R. 96

NAGAMMA *v.* THEMIS SINNO et al.

No. 18679 P. C. Kalutara.

Present : **Lascelles C. J. & Middleton J.**

28th September 1911.

Jurisdiction of Police Court—Evidence disclosing graver offence—Conviction for lesser offence—Irregularity of procedure—Discharge—§§ 380 & 382 of the Penal Code—§ 193 Cr. Pro. Code.

A lesser offence cannot be chosen for trial while the evidence discloses a graver one.

Where a person is accused of several offences, some of which a Police Magistrate has no jurisdiction to try, if the Police Magistrate disbelieves the facts constituting an offence which he has no jurisdiction to try, he should enter up an order of discharge in respect of such offence before he proceeds to try the accused for the offences summarily triable by him.

The cases cited in the argument of counsel considered to be binding and followed.

In this case the complainant filed a plaint charging the accused with robbery and hurt, offences punishable under §§ 380 and 314 of the Penal Code. On being examined by the Police Magistrate, the complainant stated that one of the accused carried away a bag containing a few bottles of arrack which she was carrying on her head, whilst the other struck her, and snatched away a gold necklace she was wearing, worth about Rs. 90. The Magistrate, thereupon issued warrants against the accused for offences under §§ 380 and 382 of the Penal Code. When the accused appeared in Court, the Police Magistrate proceeded to try them on the charge under § 380 which was triable by the Police Court, ignoring the charge under § 382 which was not triable by him summarily, and found the accused guilty and sentenced each to three months rigorous imprisonment. They appealed, *A St. V. Jayewardene* for them contended that the proceedings were irregular as the Magistrate had tried a charge under § 380 while a graver charge under § 382 was still pending, and *Middleton J.* before whom the appeal was heard directed it to be argued before two judges. The case came on for argument before Lascelles C. J. and Middleton J. on the 28th September 1911.]

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Lascelles C. J.

A St. V. Jayewardene for the accused appellants.—The Police Magistrate was acting irregularly in proceeding with the charge under § 380 which was simple robbery while a charge under § 382 which was robbery with hurt, was still pending. Where the facts disclose an offence which a Police Magistrate has no jurisdiction to try summarily, the Police Magistrate cannot ignore the facts constituting the graver offence and try the accused for a minor offence. Counsel cited *Christian v. Pedris Appu*[1]; *Saram v. Weeru*[2]; *Wikramasuriya v. Appusingho*[3]; *Siyadoris v. Gunawardene*[4]; *Sirineris v. James*[5]; *Baiya v. Nikulas*[6]; *Silva v. Andris*[7]; *Ariapody v. Seenitamby*[8]; *Abilinu v. Fernando*[9]. Some of these decisions are judgments of benches of two judges and are binding on this Court. The procedure to be adopted in cases of this kind is laid down in § 193 of the Criminal Pro. Code (see also *Sinniah Kangany v. Sinniah Kangany*[10]). [*Lascelles C. J.* If we set aside this judgment and send the case back for trial before a higher Court, the accused might receive a more severe sentence.] The accused desire the objection to be taken and would take their chance before a judge of greater experience.

Lascelles C. J. This is an appeal on a very technical ground against a conviction under § 380 of the Penal Code. It is an appeal of a type that has come before this Court over and over again. The accused were charged under §§ 380 and 382 of the Penal Code, and the facts alleged in the complaint, if true, would have supported a conviction under the graver of those charges, The Magistrate, however, proceeded under § 380, dealt with the case summarily, and sentenced the accused to three months rigorous imprisonment. It is now argued. that he was wrong in so doing, and that if he had disbelieved the facts which would have supported a conviction under

1. *(1893) 2 C. L. R. 197.*
2. *(1895) 1 N. L. R. 95.*
3. *(1895) 1 N. L. R. 298.*
4. *(1895) 2 N. L. R. 65.*
5. *(1901) 5 N. L. R. 93.*
6. *(1906) 1 A. C. R. 49.*
7. *(1907) 10 N. L. R. 203.*
8. *(1997) 10 N. L. R. 205.*
9. *(1907) 2 A.C.R. xiii (sup)*
10. *(1906) 1 S. C. D. 39.*

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§ 382, he should have discharged the accused under that section before he proceeded to try them summarily under § 380. We thought it advisable to ask the Magistrate to express his views of the case to us, and he has informed us that he believed the charge under § 382 to be true, but that the hurt was of so trivial a kind that it did not appear worth the while to press the matter, and he recorded that by an oversight he failed to record on August 17th that the charge under § 382 would not be proceeded with. Now, if the matter had been *res integra*, it would have taken a great deal to have persuaded me, that it was my duty to set the conviction aside, and to order the accused to be tried non-summarily for the offence under § 382, but the authorities are too strong for me. There is a long series of cases—some of them are decisions of a bench of two judges—in which this Court in similar circumstances has considered that it was their duty to set the conviction aside, and remit the case for a non-summary trial. I feel myself obliged to follow these decisions. I do so with considerable reluctance, especially as I believe appeals of this character are not always in the interests of the appellant, and sometimes result in the unfortunate appellants receiving a more severe sentence than was originally awarded. I would set the conviction aside, and remit the case for non-summary investigation.

Middleton, J.—I entirely agree. I referred the case to two judges in the hope that some means might be found perhaps, for putting a position of this kind on a more reasonable footing. Owing, however, to the weight of authority against us, I agree that we must bow to it, set the conviction aside, and send the case back for non-summary proceedings, and the result may be even more disastrous to the unfortunate appellants than it has been at present.

Conviction set aside and the case sent back for non-summary proceedings.

Proctor for appellant—*R. H. Wijemanne.*

ABEYARATNE *v.* PERERA

No. 32296 D. C. Colombo.

Present:—**Middleton & Wood Renton, J. J.**

31st January 1912.

Sale of mortgaged property by auctioneer under authority of Court—Application by purchaser for delivery of possession—Inherent power of the Court—§§ 201, and 287 Civil Procedure Code.

Section 287 of the Civil Procedure Code only applies to sales by the Fiscal and not to sales held by an auctioneer under the authority of Court under § 201 of the Civil Procedure Code. But the Court has inherent power to render sales of immovable property made under its orders effectual and to place the purchasers in possession of such property.

In this case the original plaintiff obtained a judgment against the defendant on a mortgage bond, and an order that the sale of the mortgaged property shall be conducted by a private auctioneer specially authorised under § 201 of the Civil Procedure Code to grant conveyances to purchasers. Subsequently the plaintiff assigned the decree in his favour to the substituted plaintiff who is the present appellant. At the sale the appellant with the sanction of the Court bid for and purchased part of the property sold, and obtained a conveyance from the auctioneer, under § 287 of the Civil Procedure Code. The appellant then moved for an order directing the Fiscal to deliver over to him possession of the property purchased. The property was alleged by the defendant in the action to have been leased by him on a notarial lease prior to the mortgage. The District Judge, held, that there was nothing in the evidence to show who was in possession of the land—whether the defendant or his lessee—and that, in any case, § 287 applies only to sales by the Fiscal. He therefore disallowed the plaintiff's application and the plaintiff appealed.

H. A. Jayewardene for the plaintiff-appellant.—Section 287 of the Civil Procedure Code applies to all sales held in execution of a decree, whether such sales are held by the Fiscal or by an auctioneer or any other person under the authority of Court. Even if § 287 has no application, the

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District Court would have inherent jurisdiction to do everything in its power to render sales made under its orders effectual and to place the purchasers in possession; otherwise the authority of sales held under orders of Court would be greatly diminished (see the observations of the Privy Council in *Kalamea v. Harperink*[1]). There is evidence to show that the defendant is in possession of the land sold and it is the duty of the Court to order him to deliver over possession to the plaintiff.

c. a. v.

Wood Renton J.—(After stating the facts of the case contined:—The question raised by this appeal is whether he (i.e. the substitute1 plaintiff) is entitled, under § 287 of the Civil Procedure Code, to an order directing the Fiscal to deliver over to him possession of the property purchased. The defendant was examined, at the instance of the appellant, under § 219 of the Code of Civil Procedure in the District Court, and gave the following evidence:—

"What I did mortgage was a cocoanut and cinnamon property—that is now in my possession. I have leased it out on a notarial lease. It was prior in date to the mortgage but I did not mention the lease to the mortgagee."

The learned District Judge held that there is nothing, in the evidence to show who is in possession of the property and that, in any case, § 287 applies only to Fiscal's sales. He accordingly disallowed the appellant's application under § 287. I agree with the learned District Judge that § 287 is concerned only with Fiscal's sales. But I venture to think that there is evidence that the defendant, in view of what he himself said on the subject is in possession of the property in question, and I do not see why he should not be noticed by the District Court to show any cause that he may have, against his being ordered to deliver over possession to the appellant. The sale has taken place

1. *I.L.R. 36 Cal: 323.*

in conformity with the directions contained in a decree which is certainly binding on him, and the Court must have inherent power to render that sale effectual.

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I would set aside the order under appeal and send the case back to the District Court for the purpose of the defendant being noticed to show cause, if he has any to show, why the appellant should not be put in possession of the property purchased. There should be no costs of this appeal or of the original proceedings in the District Court since the appellant was not entitled to the remedy, for which he applied, under § 287. The costs of the subsequent proceedings in the District Court should be in the discretion of the District Judge.

Middleton J.—I concur.

Set aside and sent back.

Proctor for appellant—*A. C. Abeyewardene.*

THE ATTORNEY GENERAL *v.* CAPTAIN SKINNER

No. 31506 P. C. Colombo.

Present: **Lascelles C. J. & Middleton J.**

2nd February 1912.

Arrest by a Peace Officer without warrant—Non-Cognizable Offence—Accused should be taken forthwith to the nearest Police Magistrate—Arrest under § 32 Cr. Pro. Code—Police can take bail—Cr. Pro. Code §§ 32 & 33 (2) and § 55 Police Ordinance 16 of 1865

Where a peace officer who was also a Police officer arrested without a warrant a person accused of a non-cognizable offence and released him on bail, and where it was contended that the arrest was made under § 33 (2) Cr. Pro. Code, and that the officer arresting being a Police Officer was empowered to take bail under § 55 of the Police Ordinance.

Held, that the Police officer had no power to take bail.

Held, also that § 33 (2) should be strictly complied with and the accused person should have been taken forthwith to the nearest Police Magistrate.

Section 55 of the Police Ordinance would apply only to cases where a person is lawfully taken into custody by a Police Officer without a warrant. that is in cases detailed in § 32 of the Cr. Pro. Code.

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Per Lascelles C. J. It is urged that there is a distinction between the two sections on the ground that § 33 (Cr. Pro. Code) deals with peace officers and § 55 (Police Ordinance) refers only to Police Officers of the regular Police. But as the term "Peace Officer" in the Code includes all Police Officers I do not see that anything can be based on this distinction.

In this case two warrants were issued by the Police Magistrate of Colombo for the arrest of one Captain Harrison against whom a charge of cheating was preferred before the Police Court of Colombo. One of the warrants was directed to the Superintendent of Police, Colombo, for execution within the jurisdiction of the Police Court of Colombo and the other was issued to the Superintendent of Police, Kandy. Before the warrant reached Kandy a telegram was despatched from Colombo to the Superintendent of Police, Kandy, to arrest Captain Harrison. The Superintendent showed this telegram to Inspector Peiris and asked him to arrest Captain Harrison. The Inspector accordingly arrested Captain Harrison without a warrant, but released him on his executing a security bond for Rs. 3000 with Captain Skinner as surety. Captain Harrison thereafter left the Island, and at the instance of the Attorney General Captain Skinner was noticed by the Police Court of Colombo to show cause why his security bond should not be forfeited. The Police Magistrate held that inasmuch as Captain Harrison was arrested without a warrant the bail bond for his release was invalid and he discharged the notice. The Attorney-General appealed.

Walter Pereira K. C. S-G. (with *Akbar C. C.*) for the appellant.—It can hardly be said that the arrest of Captain Harrison was illegal. The Inspector who made the arrest was informed that there was a warrant out against the accused and he was shown the telegram sent by the Superintendent of Police, Colombo, to the Superintendent of Police, Kandy. He had hence sufficient reason to believe that the accused had no permanent residence in the Colony and was about to leave it. The Inspector was therefore justified by § 33 (2) of the Criminal Procedure Code in arresting the

accused. The arrest being legal the taking of the bail bond was in order. [*Middleton J.* § 33 (2) provides that the person arrested should be taken forthwith before a Police Magistrate.] Yes, that is the general rule, § 33 (2) says that the *Peace Officer* arresting should do that. "Peace Officer" is defined by the Code to include a Police Officer and where a Police Officer arrests he may exercise the further power given him by § 55 of the Police Ordinance. That section has not been repealed and there is no reason to suppose that a Police Officer cannot still act under it. Section 55 provides that every person taken into custody by a Police Officer without a warrant should be delivered into the custody of the officer in charge of the Police Station who may admit him to bail. There is no reason to limit the section to arrests in the case of cognizable offences only, as may be contended on the other side. The section speaks of arrest without a warrant and so long as the arrest is legal the Police may act under the section. [*Lascelles C. J.* § 33 (2) of the Code and § 55 of the Police Ordinance do not appear to be consistent with each other.] I think they can well stand together. While large portions of the Police Ordinance have been repealed § 55 has been left untouched, the intention clearly is to continue its operation. Section 33 (2) speaks of peace officers generally but when the peace officer is a police officer he has the additional power under the Police Ordinance. [*Lascelles C. J.* The provision of the old Code empowering Police officers to take bail has been removed by the new Code.] Yes, that may well have been, because that provision already existed in the Police Ordinance and it was no use giving the same power under the Code as well. Section 55 of the Police Ordinance has as much effect as any unrepealed section of that Ordinance. In the case of § 59 it has been expressly held that it is not deemed to have been superseded by Chapters IV & V of the Criminal Procedure Code. (*Cornelis v. Cookson.*)[1] The warrant was directed to the Police and it made no difference

1 *(1902) 6 N.L.R. 40*

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which Police officer arrested. It has been held that the Police have power to perform their duties over the whole Island (*Gressy v. Perera*)[1] [*Lascelles C. J.* The head-note is misleading; that case applies only to cognizable offences.] Yes; that case dealt with a cognizable offence, but the principle underlying the decision is that the duty of a Police Constable, whatever that duty may be, may be performed anywhere.

Elliott for the respondent was not called upon.

Lascelles C. J.—This is an appeal from an order of the Police Magistrate of Colombo refusing to forfeit the bail bond marked X 3. The material facts of the case, shortly stated, are as follows :—Two warrants were issued by the Police Court of Colombo for the arrest of a Captain Harrison. One of these was issued to the Superintendent of Police, Colombo, for the arrest of the offender within the jurisdiction of the Police Court of Colombo, and the other was issued to the Superintendent of Police, Kandy. The warrants were both issued on the 23rd of December, 1911. Captain Harrison was arrested by the Police in Kandy, and it is admitted that the Officer who arrested him had not either of the warrants issued in Colombo, or a copy of either of them. The arrest was in effect an arrest without a warrant at all. The Officer who arrested Captain Harrison released him on the security bond X 3 being executed with Captain Skinner as surety. The Police Magistrate has held that, in as much as Captain Harrison was arrested without a warrant, the bail bond for his release was invalid, and of no effect. The question seems to turn upon the construction of § 33 of the Criminal Procedure Code, and § 55 of Ordinance No. 16 of 1865—the Police Ordinance. Under the former section it is provided, by sub-section (2), that, if a Police Officer has reason to believe that a person who is accused of committing a non-cognizable offence is about to leave the Colony, he may be arrested by the Police Officer, and thereupon he may be taken forthwith to the

1 (1906) 5 N.L.R. 116

nearest Police Magistrate who may either require him to execute a bond with or without a surety, or may order him to be detained in custody until trial. Now, if the Police of Kandy had acted under sub-section (2) of section 33 of the Criminal Procedure Code, their action would have been beyond question. Captain Harrison, on arrest would have been immediately taken before the Police Magistrate at Kandy, who, in all probability would have admitted him to bail, and the surety bond would have been a perfectly good and enforceable security. But the Police have not conformed to the procedure prescribed by this sub-section. If Captain Harrison was in fact arrested under the provisions of this sub-section, which provides for cases of emergency then the Police ought to have strictly complied with the provisions of this sub-section. It is contended that the arrest, and therefore the bail bond, is valid under § 55 of the Police Ordinance. But the section seems to me to apply only to cases where a person is lawfully taken into custody by a Police Officer without a warrant. These cases are detailed in § 32 of the Criminal Procedure Code, and it seems to me that § 55 must apply to cases of this character. Otherwise there would be a serious discrepancy between § 55 and §33 of the Criminal Procedure Code. It is urged that there is a distinction between the two sections on the ground that § 33 deals with peace officers, and § 55 refers only to Police Officers of the regular Police. But as the term peace officer in the Code includes all police officers I do not see that anything can be based on this distinction. The decision of the Police Magistrate is, in my opinion correct and should be affirmed.

Middleton J.—I agree.

Appeal dismissed.

Proctors for Respondent—*Julius and Creasy.*

EMIS *v.* SANGO.

No. 6429, C. R. Galle.

Present : **Lascelles, C. J.**

3rd August 1911.

Prescription—Agreement in writing to re-transfer a land within ten years on re-payment of purchase money—When tender can be made—Action for specific performance—Date of accrual of cause of action—Prescription Ord : No. 22 of 1871, § 7.

A cause of action to compel specific performance of an agreement in writing to re-transfer a land on payment of a certain sum of money within a certain period would accrue as from the date of the refusal to accept a valid legal tender of the money and would be prescribed in six years from the date of such refusal.

Such tender can be made at any time before the expiration of the fixed period.

As the agreement is in writing the term of prescription is that defined in § 7 of Or d. 22 of 1871.

This was an action to compel specific perfomance of an agreement in writing entered into between Gunetti Kacho of the first part and Ranahinge Neina of the second part on the 21st day of July, 1899. The plaintiffs are the heirs of the said Neina and the defendants are the administrators of the Estate of the said Kacho. The material part of the agreement was as follows :—"Whereas the party of the first "part by deed No. 16482 purchased for the sum of Rs. 200 "the field . . . . . And it was agreed that in the "event of the payment to the party of the first part Gunetti "Kacho or her heirs etc. by the party of the second part "Ranahinge Neina or her heirs etc. at any time within ten "full years from the date hereof the said sum of Rs. 200, "shall for the said sum of Rs. 200, convey the said rights "by a notarially executed deed." The plaintiffs alleged that early in the year 1907 the said Neina offered Rs. 200. to the heirs of Kacho (Kacho then being dead) and asked for a reconveyance of the property, which they failed to give. Shortly afterwards Neina died leaving the plaintiffs as his heirs. In the meanwhile the present defendants were appointed administrators of the estate of Kacho. After such

appointment viz. in March 1910, the plaintiffs offered to the defendants Rs. 200. and asked for a reconveyance of the property which they refused to give. Thereupon the plaintiffs on the 2nd November 1910 deposited the said amount in Court and brought the present action. On objection taken by the defendants, the Commissioner of Requests, Galle (B. Contantine Esq;) dismissed the plaintiffs' action, holding that the right to sue for a re-transfer was a cause of action which arose at once on the execution of the agreement, though subject to a condition, and that, therefore, the action should have been brought within 10 years. He also held, incidentally, that, even construing the agreement not as a definite agreement but as a declaration of a right, the action would be prescribed under § 11 as three years had elapsed since the refusal of the defendants to carry out the contract. Emis v. Sango

The plaintiffs appealed.

A. St. V. Jayewardene for the plaintiffs-appellants.—According to the agreement the vendor had full ten years within which to offer the money for the reconveyance, and six years from the date of the refusal to accept, to institute an action to compel specific performance. The refusal to accept the money and execute a conveyance would be a breach of a written agreement and the term of prescription would be six years under § 7 of Ord : 22 of 1871. The Supreme Court has held that rent reserved under a lease in writing could be recovered within six years *(De Silva v. Don Louis* [1]). Counsel also referred to *Angell on Limitations pp. 104, 105, and 106* and to *Darby and Bosanquet's Law of Limitations pp. 18, 19 and 20.*

Gunetilleke for the defendants-respondents.—The plaintiffs ought to have offered the money and brought the action within the 10 years stipulated in the deed of agreement. [*Lascelles C. J.* Had not the plaintiff time till 12 p.m. of the last day of the ten years to offer the money ?] yes, that would be so. [*Lascelles C. J.* Suppose they did so and the

1 (1881) 4 S. C. C. 89.

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offer was refused.] Then the action should have been brought within three years of the refusal when the cause of action arose. This not having been done, the action is prescribed under § 11 of the Ordinance. [*Lascelles, C. J.* Does not § 7 apply to a case of this kind ?] No, as express provision is not made for a case of this kind, § 11 of the Ordinance would apply.

Lascelles, C. J.—This case turns on the construction of the document P ¹; the material part of which is as follows :—" And it is agreed that in the event of the pay-" ment to the party of the 1st part, Gunetti Kacho, or her " heirs etc. by the party of the second part, Ranahinge Neina " or her heirs etc. at any time within 10 full years from the " date hereof the said sum of Rs. 200—shall for the said sum " of Rs. 300 convey the said rights by a notarially executed " deed." Now it is argued, and it has been held by the Commissioner of Requests, that unless the sum of Rs. 200 was paid within the term of 10 years, the plaintiffs had no rights under the agreement. I cannot agree with this view. It seems clear to me that the intention of the deed was that Ranahinge Neina should be allowed to pay the sum of Rs. 200 at any time before the expiration of ten years. If he did all that he could to pay that sum ; that is, if he made a valid legal tender of the amount, and the defendants refused to accept the offer, then a cause of action would have accrued to the plaintiffs as from the date of the refusal of his offer. Inasmuch as the agreement is in writing, it is clear that the term of prescription is that defined in § 7 of Ordinance No. 22 of 1871, namely six years. If, therefore, the plaintiffs are able to establish that in 1907 Ranahinge Neina made a valid legal tender of the sum of Rs. 200 and that offer was refused by the heirs of Gunetti Kacho, a cause of action accrued as from that date to the plaintiffs and the period of prescription has not yet expired.

The judgment of the Commissioner of Requests must be set aside, and the case remitted to him in order to try

the issue whether a legal tender of Rs. 200 was made and refused in 1907, as alleged in paragraph 6 of the plaint. If this is established, then the claim of the plaintiff is not prescribed.

The appellant is entitled to the costs of the appeal.

Case Remitted.

Proctor for Appellant—*D. G. Goonewardene.*
Proctor for Respondent—*A. Dias Abeysinghe.*

THE ATTORNEY-GENERAL *v.* ROMEL FERNANDO.

No. 2895 D.C. (Cr:) Negombo.

Present : **Middleton J.**

29th January 1912.

Cheating by personation—Fraudulently—Intent to defraud—Proof of damage or harm to the party deceived necessary—Test of fraudulent character of deception—Penal Code §§ 23,398,402 and 490.

Where the accused, in order to raise a sum of money from a Chetty on the mortgage of a land belonging to his mistress, brought, with his mistress' consent, another woman before the Notary to personate her and execute the deed in place of her and pretended both to the Notary and the Chetty that that woman was his mistress,

Held, that the accused was not guilty of attempting to cheat the Notary as there was no evidence given by the Notary that such personation would affect his reputation, but was guilty of attempting to cheat the Chetty.

" A practically conclusive test as to the fraudulent character of a " deception for criminal purposes is this :—Did the author of the deceit " derive any advantage from it which could not have been had if the truth " had been known ? If so, it is hardly possible that the advantage should not " have had an equivalent in loss or risk of loss to some one else ; and if so, " there was frand."

In this case the accused came to Negombo, at the request of his mistress Ligona with a title deed belonging to her in his pocket, to raise a sum of money on it to enable

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her to pay certain debts incurred by her. Ligona could not accompany him as her children were ill. He went to a Chetty who agreed to lend the sum of money provided both the accused and his mistress jointly and severally bound themselves by the mortgage bond. The accused said his mistress could be produced at once to sign the deed and so he and the Chetty repaired to a Notary and gave him instructions as to the drawing up of the deed and later in the same day the accused took a girl Isa to the Notary's office to sign the deed as as his mistress Ligona, but when the deed was about to be signed, it was discovered that the woman present was not Ligona but was personating her. The accused was thereupon charged on two counts with attempting to cheat by personation the Notary and the Chetty. The District Judge of Negombo (John Scott Esq :) acquitted the accused on both counts, holding on the 1st count, that although the accused did by personation and deception intentionally attempt to induce the Notary to do an act which he would not have otherwise done, such act was not at all likely to cause damage or harm to the Notary as mentioned in the definition of cheating ; and on the 2nd count, that although the accused attempted by deception to induce the Chetty to lend him Rs. 125, it was not done with intent to defraud the Chetty because he acted on the instructions of Ligona.

The Attorney-General appealed against the acquittal.

Walter Pereira K. C. S.-G. for the appellant.—The Notary is a professional man and would certainly have suffered both in mind and reputation. The Registrar-General, in particular, would have looked upon him with a considerable amount of suspicion, if not as a conniver at false deeds. The acquittal on the 1st count should therefore be reversed. In dealing with the 2nd count the learned District Judge has gone wrong in the interpretation of the term "with intent to defraud," which occurs in the definition of the word "fraudulently." Sir James Stephen writes : "where the words 'with intent to defraud' occur in the definition of a crime two elements at least are essential : namely (1) deceit

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or an intention to deceive (2) either actual injury or a risk of possible injury by means of that deceit or deception." A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have if the truth had been known? If so, it is hardly possible that that advantage should not have had an eqivalent in loss or risk of loss to some one else; and if so there was fraud (see the judgment of Bannerji J. in *Queen v. Muhamed Saeed Khan*[1] where he cites a passge from *Sir James Fitz James Stephen's History of the Criminal Law of England Vol: 2 p. 121*). The facts show that the accused would have gained an advantage because the Chetty says he would not have consented to lend the money if he knew that Isa was personating Ligona. It is also clear that the Chetty would have run the risk of loss because there was nothing to prevent Ligona from impugning the deed at any moment. The acquittal on the 2nd count also should be reversed.

E. G. P. Jayetileke for the accused-respondent.—The question whether the act of the accused was likely to cause the Notary harm in mind or reputation is not a matter of speculation but of positive evidence (see *Rex v. Bastian*[2]). There is no evidence on record to that effect. It was held in the same case that such a question was one for the jury and it is submitted that the finding of the learned District Judge on that point is final. Besides, the possibility of the Notary suffering in reputation and losing his accustomed patronage and fees in future, is too remote to be in the contemplation of § 398 of the Penal Code (see *Queen Empress v. Mojey*[3]). According to the authorities cited by the learned Solicitor-General the test whether a person acted fraudulently lies in the intention of that party. It has been found by the learned District Judge as a question of fact that the

1. *I. L. R. 21 All: 113.*

2. *(1902) 2 Bal: 95 at p. 100.* 3. *I. L. R. 17 Cal: 606.*

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accused did not intend to defraud the Chetty, and it is submitted that this finding is conclusive. The accused would have gained no advantage whatever, personally, by this transaction ; it was his mistress who would have been benefited. He being a party to the deed would have been at a great disadvantage because the Chetty could have proceeded against him in case there was a deficiency. The Chetty would not have been exposed to any risk of loss because it was not open to Ligona to impugn the deed, she having authorised the accused to act in the manner he did. The presumption must be in favour of honesty and the Court cannot be called upon to act on the supposition that she would act dishonestly. In England it has been held that a person could be authorised to sign another's name (see *France v. Dutton*[1] : *The Queen v. Justices of Kent*[2].) ; if the presumption is in favour of dishonesty, the persons who signed in these particular cases should have been indicted for forgery. A mere lie uttered by the accused to the Chetty that Isa was his mistress is not fraudulent and therefore does not render him guilty of an attempt to cheat (see *Emperor v. Baburam Rai*[3]). The accused brought Isa to do an act which Ligona would have herself done but for the illness of her children and this proves conclusively that his conduct was not fraudulent (see *Empress v. Loothy Beera*[4]). Counsel also referred to *Emperor v. Katamraju*[5]; *Meera Saibu v. Paulu Silva*[6] : *Gour's Penal Law of India Vol : 2 p. 1093.*

Walter Pereira K. C., S.-G. in reply. *c. a. v.*

Middleton J.—In this case the accused was tried on two counts in one indictment charging him with attempting to cheat one H. E. de Silva a notary public by personation by falsely producing one Isa before him as one Ligona and endeavouring to get a deed of mortgage executed by

1. *L. R. 2 Q. B. D. 210*
2. *L. R. 8 Q. B. 305*
3. *I. L. R. 32 Cal: 775.*
4. *11 W. R. (Crim:) 24.*
5. *I. L. R. 28 Mad 90.*
6. *(1900) 4 N. L. R. 229*

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the said notary in favour of Arumugam Chetty, thereby committing an offience punishable under §§ 402 and 490 of the Penal Code; (2) with attempting to cheat the said Arumugam Chetty by personation by falsely producing the said Isa as the said Ligona and endeavouring to get a deed of mortgage executed by the said H. E. de Silva notary public in favour of the said Arumugam Chetty, an offence punishable under §§ 402 and 490 of the Penal Code.

The District Judge held that although the attempted intentional inducement of the Notary of the accused by means of personation or deception to do an act which he would not have otherwise done is clearly established that act was not likely to cause damage or harm to the Notary as mentioned in the definition of cheating in § 39 of the Ceylon Penal Code; (2) that although the accused undoubtedly attempted by deception to induce the Chetty to lend him Rs. 125, he did not do so with fraudulent or dishonest intention.

The facts were practically admitted by the defence, and the District Judge found that the accused intentionally substituted Isa for Ligona and attempted by this deception to induce the Chetty to lend him Rs. 125 although he did not intend to defraud the Chetty; while the woman stated she consented to being personated and the Chetty averred that he refused to lend the money without the signature of the accused's wife Ligona.

The questions on both counts under § 398 are whether the act of personation were fraudulent or dishonest deceit which would cause or be likely to cause damage or harm to the Notary or the Chetty in body, mind, reputation or property.

The first question is, was the deceit fraudulent, putting aside the element of dishonesty as defined in the code? In *Queen v. Muhamed Saeed Khan*, [1] relied on by the Solicitor

1. *I.L.R. 21 All. 114.*

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General, Bannerji J. quotes from Sir James Fitz James Stephen's History of the Criminal Law of England Vol : II p. 121, where it says that "A practically conclusive test "as to the fraudulent character of a deception for criminal "purposes is this :—Did the author of the deceit derive any "advantage from it which could not have been had if the "truth had been known ? If so, it is hardly possible that the "advantage should not have had an equivalent in loss or "risk of loss to some one else, and if so there was a fraud."

The cases reported in 28-Madras 90 ; 4 N. L. R. 229 ; L. R. 8 Q. B. 305,307 : L. R. 2 Q. B. D. 210 ; 11 I. W. R. (Criminal) 24 ; 32 Calcutta 775 ; 2 Gour 1093 ; 2 Bal : 100 and 17 Calcutta 606 were relied upon in the interests of the accused. It seems to me however as the Solicitor-General argued that most of these cases are hardly in point.

In the case relied on in 32 Calcutta 775, the collector who handed over the money there was not harmed in body mind or reputation and the person who received it was authorised to do so.

Again in 11 I. W. R. 24 it was held there was nothing to show an intention to defraud or injure any one by obtaining the registration of a deed in the right name by the personation of the vendor by another woman.

In 17 Calcutta 606, the loss or damage likely to be caused to the Registrar of Mohammedan Divorces by the personation of one person by another to him was held to be too remote to constitute a case of cheating according to the criminal law.

As regards the first count on the indictment the count was the same as in *Rex v. Bastian et al* [2] and there I held it was a question for the jury whether it was likely or possible that the Notary would be injured in mind or reputation.

There is no evidence, however, given by the Notary here to prove that such a personation would affect his reputa-

2. 2 *Bal:* 95.

tion, although I have very little doubt that it might have done so with the Registrar-General, if not with the respectable public, if the personation had succeeded and had been subsequently repudiated by the accused.

I hesitate to interfere, therefore, with the finding of the District Judge on that count.

On the second count as regards the Chetty, however, I think the case is different to that reported in 11 I. W. R. (Criminal) 24

In that case the intention was manifest that the real vendor was on her way to carry out the sale when she was taken ill.

In the present case although Ligona now says she ratifies the act of her personator, it is clear to me that the Chetty would not have advanced the money to the accused had he known that Isa was to sign for Ligona, and that if Isa had signed he would have advanced money to the accused on a deed which it is quite likely might have been repudiated by Ligona, and so have caused him damage.

The accused falsely pretended to the Chetty that Isa was Ligona with the object of obtaining a loan from him, an act fraudulent within the meaning of Sir James Fitz James Stephen's dictum, and certainly likely at the least to have caused injury to the Chetty.

I think, therefore, that the verdict on the second count should be reversed and a verdict of 'guilty' entered in its place, but that the verdict on the first count must stand.

I send the case back to the District Judge to impose such a sentence as he may be advised to inflict.

Acquittal on the 1st count affirmed and on the second count reversed.

Proctor for Respondent.—*H. A. Jayetileke.*

DON THOMAS *v.* DON GIRIGORIS

No. 16175 P. C. Negombo.

Present: **Middleton J.**

29th January 1912.

Cattle Trespass—Ordinance 9 of 1876 § 12—Unlawful removal from custody—Necessity of proof of legality of seizure and detention—Criminal Trespass—Intention to commit offence not punishable under Penal Code—Offence must be punishable with imprisonment of six months or upwards—Ord: 8 of 1909 § 6, Penal Code §§ 38, 427, and 433.

In a charge under § 12 of "The Cattle Trespass Ord: 1876" there must be proof that tho cattle, which the accused is charged with removing without lawful right, were legally seized, or detained for trespass or otherwise under the provisions of that ordinance.

Gregoris Gomis v. Kuppe Tambi [1] and *709 P. C. Panadure 34706* [2] followed.

In a charge of Criminal Trespass where the intention alleged is to commit an offence, such offence if punishable by any law other than the Penal Code, must according to § 38 of the Penal Code be punishable under such law with imprisonment for a term of six months or upwards.

In this case the accused was charged under § 12 of Ord: 9 of 1876 as amended by § 6 of Ord: 8 of 1904 (The cattle Trespass Ord:)* with removing without lawful right two head of cattle detained for trespass from the custody of the Complainant, a Police Vidane, and under § 433 Penal Code with committing Criminal Trespass by entering the land of the said Police Vidane with intent to remove unlawfully the said two head of cattle lawfully detained for trespass. At the trial evidence was led to prove that the cattle were brought and tied up in the complainant's compound and that the accused entered the compound and forcibly removed the cattle. No evidence was led to prove that the animals

1. *(1882) 5 S.C.C. 24.* 2. *S.C. Min: 12 January 1911.*

* § 12 as amended by § 6 of Ord 8 of 1909. . " Any person without lawful right removing or taking away, or attempting to remove or take away, or causing to be removed or taken away any cattle or animals from the custody of the persons entitled to keep or detain the same under the provisions of this Ordinance shall he guilty of an offence and shall be liable on conviction to a fine which may extend to fifty rupees and in default of payment to rigorous imprisonment for a term not exceeding 3 months.

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were seized while trespassing. The Magistrate convicted the accused and fined him Rs. 5 on each count.

The accused appealed.

A. St. V. Jayewardene for the accused appellant.—The conviction on the first count (§ 12 Ord : 9 of 1876) is bad, as there is no evidence that the cattle had been legally seized or detained. Proof of such seizure and detention is necessary as the headman must show that he is legally entitled to seize or detain the cattle under the ordinance : vide § 12 of the Ordinance and also *Gregoris Gomis v. Kuppe Tamby* [1] which was followed by Hutchinson C. J. in *709 P. C. Panadure 34706* [2]. The conviction on the second count for criminal trespass (§ 432 Penal Code) is also bad. According to the definition of "Criminal Trespass" (§ 427) the entry must be with the intent either to intimidate, insult. or annoy the person in occupation or to commit an offence. If the intention is to commit an offence which is punishable by any law other than the Penal Code, the offence must be punishable with imprisonment for six months or upwards : see § 38 of the Penal Code. Here the intention alleged is to commit an offence punishable under § 12 of the Cattle Trespass Ord, viz : to remove unlawfully cattle lawfully detained. By Ord : 9 of 1909 § 6, an offence under § 12 is punishable with a fine not exceeding Rs. 50 or in default with rigorous imprisonment for a term not exceeding 3 months. Thus if the accused entered on the complainant's premises with the intention of committing the offence alleged he is not guilty of Criminal Trespass. Further, the intention to commit this offence cannot be proved as there is no proof that the cattle were legally seized or detained by the complainant. The accused is therefore entitled to be acquitted.

c. a. v.

Middleton J.—The accused was convicted of (1) removing without lawful right two head of cattle detained for

1. *(1882) 5 S.C.C. 24.* 2. *S.C. Min : 12 January 1911*

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trespass from the custody of Police Vidane Don Thomas under § 12 of Ordinance 9 of 1876 and (2) of committing criminal trespass by entering the land of the said Don Thomas Police Vidane with intent to unlawfully remove the said two head of cattle lawfully detained for trespass under § 433 of the Criminal Code.

The contention for the appellant is that for the first offence there was no proof adduced of the legal seizure or detention of the cattle in question for trespass or otherwise, and that a link in the chain of proof was wanting as laid down in the case of *Gregoris Gomis v. Kuppe Tambi and another* [1] followed by Chief Justice Hutchinson in *709 P.C. Panadure 34706* [2]

On reading through the evidence, it is clear that there is no proof that the cattle were legally seized and tethered in the Police Vidane's compound or that he was entitled to keep them there.

On the second charge it was objected that an offence under § 12 of Ordinance 9 of 1876 was not such an offence as is contemplated in the definition of criminal trespass in § 427 of the Penal Code which is limited by § 38 of the Code to offences punishable by imprisonment for 6 months or upwards.

Under § 12 of Ordinance 9 of 1876 the offence there may be punished with such imprisonment as a Police Court has jurisdiction to award, but this has been altered by § 6 of Ordinance 8 of 1909 to a fine of Rs. 50 or in default to rigorous imprisonment not exceeding 3 months and so is not an offence in the meaning of that word as used in § 433 of the Penal Code.

I hold therefore that this objection must also be sustained as the offence under § 12 of Ordinance 9 of 1876 as amended by § 6 of Ordinance 8 of 1909 is not punishable by 6 month's inprisonment.

1. *(1882) 5. S.C.C. 24.* 2. *S.C.M. 12 Jany: 1911.*

As therefore no offence was proved to be committed by the removal of the cattle by the accused it is not been possible to sustain the conviction on the second charge which purports to be for criminal trespass founded on an intention to commit that which has not been proved to be nor can it be an offence referred to in § 433.

The appeal must therefore be allowed and the conviction set aside and accused acquitted.

Conviction set aside and the accused acquitted.

Proctors for appellant.— { *A. E. Aserappa.* / *D. W. Samaratunge.* }

THOMIS FERNANDO *v.* PERIES *et al*

No. 4521 D. C. Kalutara

Present: **Lascelles C. J. and Wood Renton J.**

7th February 1912.

Necessity for settling issues before proceeding to trial.

The Judge ought to record the settlement of the issues on which by his direction the case goes to trial.

When both sides suggest different sets of issues, the Judge ought to rule on the rival sets and decide definitely as to what are the issues on which he directs the parties should go to trial.

Bawa for the Plaintiff-Appellant.

Wadsworth for the Defendants-Respondents.

Lascelles C. J. delivered a judgment dealing solely with the facts of the case.

Wood Renton J. I entirely agree, and have nothing to add as to the merits of the appeal. But I desire to call the attention of the District Judge to the fresh illustration which this case affords of the embarrassment that is constantly being caused to us in hearing both District Court and Court of Requests' appeals, by the failure of the Judge to record the settlement of the issues on which, by his direction, the case went to trial. We have here, first, several

Bliss v. Perera issues suggested by the proctor for certain of the defendants. These are followed by several other issues proposed by the proctor for the plaintiff. There is no entry by the Judge as to what his final ruling in regard to these riva sets of issues was, and we can only speculate as to the main points which, in his opinion, the decision of the case had ultimately to rest. There ought, I think, to be in such cases a definite statement by the Judge as to what are the issues on which he directs that the parties should go to trial.

Appeal allowed.

Proctor for appellant—*F. A. C. Tirimanne.*
Proctor for respondents—*C. A. L. Orr.*

BLISS *v.* PERERA.

No. 28027 P. C. Kandy.

Present: **Wood Renton, J.**

28th February, 1912.

Labour Ordinance—motor-car chauffeur—servant—journey-man artificer—§ 11 of Ordinance No. 11 of 1865.

A motor-car chauffeur is not a servant or journey-man artificer within the meaning of Sec. 11 of Ordinance No. of 1865.

No person can be called an artificer unless the primary duty of his service is the making of something; and if that condition is not fulfilled he will not become an artificer merely because a subsidiary duty to make something is incidentally imposed upon him.

In this case the accused who is a chauffeur was charged with wilful disobedience of orders and neglect of duty under § 11 of the Labour Ordinance. The accused contended that he was not amenable to the [provisions of Ordinance No. 11 of 1865 in that he was not a servant within the meaning of § 1 nor a journeyman artificer within the meaning of § 5 of the Ordinance. The learned Police Magistrate held that the accused was a servant and convicted him.

Against this conviction the accused appealed. Bliss v. Perera

G. Koch for the appellant.—The appellant cannot be brought under any one of the classes of persons described in § 1 of Ordinance No. 11 of 1865. He is not a "menial, domestic or other like servant." Menial and domestic servants are those who reside in their master's house—see *1 Beling and Vand. 29 ; Pearce v. Lansdowne* [1]; *Nowlan v. Ablett* [2] ; and *Halsbury's Laws of England Vol. 20 p. 70*. Nor can he be brought under the term "journeyman artificer." An artificer is a skilled workman (*Morgan v. London General Omnibus Co.*[3]), one who *makes* something as distinguished from one who only *does* something (*Palmer v. Snow* [4].) It has been held that the driver of a tram-car is not a workman within the meaning of the Employers and Workmen Act of 1875 (*Cook v. The North Metropolitan Co.* [5]) "Workman" has been defined in this act as "a labourer, servant in husbandry, journeyman artificer, handicraftsman, miner or a person otherwise engaged in manual labour."

H. A. Jayewardene (with *V. Grenier*) for the respondent.—Any servant or employer whether he comes or not within the definition of servant in § 1 of Ordinance No. 11 of 1865 is punishable for drunkenness, disobedience of orders, neglect of duty etc. The words "extend to and include" in § 1 show that the definition is not exhaustive. (see *Ludovici v. Nicholas Appu.*[6]) The appellant comes within the term "journeyman artificer." *Jansz v. Sinno* [7] ; *Cave v. William* [8]. An omnibus driver was held to be a workman under the act of 1875 : *Smith v. The Associated Omnibus Co.* [9]

Koch in reply.—*Jansz v. Sinno* [7] and *Cave v. Williams* [8] have no application as, in those cases, blacksmiths and machine rulers were held to be artificers on the ground that their occupation is chiefly manual. *Smith v. The Associated Omnibus*

1 (1893) 69 L. T. 316.
2 (1835) 2 C. M. & R. 54.
3 (1884) 13 Q. B. D. 832.
4 (1900) 1 Q. B. 725.
5 (1887) 57 L. T. 476.
6 (1900) 4 N. L. R. 12.
7 (1901) 2 Br. 251.
8 (1893) 2 S.C.R. 157.
9. (1907) 1. K. B. 916.

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Co. [1] is not in point as the decision in that case turned on the interpretation of the words "otherwise engaged in manual labour" in the act of 1875.

Wood Renton J.—This is an interesting case, and it has been well argued on both sides. The accused appellant who is, or was, the chauffeur to Mr. Bliss was charged in the Police Court of Kandy with wilful disobedience of orders and gross neglect of duty within the meaning of the provisions of § 11 of Ordinance No. 11 of 1865. The learned Police Magistrate convicted him and sentenced him to undergo one month's rigorous imprisonment. On the facts the appellant is entitled to no indulgence and it is with regret that I have come to the conclusion that the conviction against him must be set aside. The evidence proves beyond all doubt that, in defiance of the express instructions of his employer, who had directed him to go to Messrs. Walker & Co. for petrol, he took the car on the road to Katugastota, and there, whether by his carelessness or incompetence or otherwise does not appear, succeeded in damaging it to the extent of Rs. 500. If he falls within the provisions of § 11 of Ordinance No. 11 of 1865, he richly deserves to undergo the sentence that has been passed upon him. There are only two terms in that section which have any bearing on the question of law involved in this appeal. The one is "servant", the other is "journeyman artificer." § 11 applies to the misconduct of "any servant." But for the definition of "servant" we are thrown back on § 1. That section provides that the word "servant" shall extend to and include menial, domestic, and other like servants, pioneers, kanganies and other labourers whether employed in agricultural, road, railway or other like work." It is quite true, Mr. Hector Jayewardene pointed out in his argument on behalf of the respondent, that the term "include", when we meet with it in the provisions of a statute, should be interpreted generally as if the words used were "shall include in addition to its ordinary and popular

1. *(1907) 1 K. B. 916.*

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meaning." But it seems to me that the language of § 1 cannot be made to apply to persons in the position of the appellant. It must be borne in mind that a chauffeur is a person presumed to be possessed of mechanical skill. He requires a license to enable him to exercise his calling ; and he is paid wages or salary in excess of any other of the classes of servants referred to in § 1. I was inclined at one time during the argument to think that the case of chauffeur might be brought under the words "other like servants," and that he would come within the scope of those words just as a coachman is admitted to do, on the ground that the only difference between his case and that of the coachman is that he drives a machine, while the coachman drives a horse. But the considerations as to special skill, as to the necessity for a license, and as to higher wages, which I have just mentioned, seem to me, on further consideration, to make it impossible to hold that that analogy is good. I would also point out that the words in § 1 " following other like servants"—words which I have quoted above shew distinctly that it is to servants not belonging to what may be called the skilled class that § 1 applies. If the appellant is not a servant within the meaning of § 1 can he be said to be a journeyman artificer within the meaning of § 11 of Ordinance No. 11 of 1865 ? The mere use of the term "journeyman" would not prevent him from being so considered, even although he is a monthly servant, and not one working from day to day. It was held by this Court in the case of *Jansz v. Sinno*[1], and if I may say so respectfully the decision seems to me to be sound, that the provisions of § 7 make it clear that Ordinance No. 1865 regards the term "journeyman" in a sense wider than its literal meaning. There remains, however, the difficulty of holding that a chauffeur in the position of the appellant is an "artificer". The term "artificer" has been defined by the English Courts in two cases at least. In *Morgan v. London General Omnibus*

1 (1911) 2 Br. 251.

Bliss v. Perera

Wood Renton, J.

Company [1] Brett L. J. said that an artificer is a skilled workman ; and to that definition the later decision of Channell J. and Bucknill J., in *Palmer* v. *Snow* [2] has added this qualification that he must be a skilled workman who makes some thing, as distinguished from one who only does something. It was on that ground that in *Palmer v. Snow* [3] the learned Judges just mentioned held that a hairdresser is not an artificer within the meaning of the Lord's Day Observance Act (29 Charles 2, c. 7, s. 1), because he only does something and makes nothing. On the strength of these authorities, it seems to me that no person can be called an artificer unless the primary duty of his service is the making of something, and that, if that condition is not fulfilled, he will not become an artificer merely because a subsidiary duty to make something may be incidentally imposed upon him. I was referred by Mr. Hector Jayewardene to the decision of Darling and A. T. Lawrence, J. J. in *Smith v. Associated Omnibus Company*, [3] where it was held that the driver of a motor Omnibus was a workman within the definition of § 10 of the Employers' and Workmen's Act, 1875, since his duty was not only to drive the Omnibus, but also to start it by means of the starting handle, after working the pump to get pressure up, and at the same time to repair anything that went wrong on the road. We are concerned, however, not with the interpretation of the term "workman", but with that of the word "artificer", which has been defined as including only workmen of a special class, namely those whose primary duty is to make something and not merely to do something. On the grounds that I have stated, but with regret in view of the appellant's gross misconduct, I have come to the conclusion that the conviction and the sentence must be set aside and that the appellant must be acquitted. I direct accordingly.

Conviction quashed.

Proctor for Appellant—*J. D. Jonklaas.*

Proctor for Respondent—*R. W. Jonklaas.*

1. *(1884) 13 Q.B.D. 832.* 2. *(1900) 1 Q.B. 725.* 3. *(1907) 1.K.B. 916.*

PAARIS *v.* PERERA. *et al* :

No. 8222 D. C. Negombo.

Present : **Lascelles C. J. & Grenier J.**

15th February 1912.

Registration—Fiscals's Conveyance—Registration in wrong folio does not amount to registration under the Ordinance—"So registered"—Registration Ordinance No 14 of 1891 §§ 15 (1), 16 and 17—Partition action—Execution-Creditor—Status.

A deed which has been registered in the wrong folio is void as against parties claming an adverse interest. on valuable consideration, by virtue of a subsequent deed which has been duly registered.

Per Lascelles C.J. A deed which is not registered in the proper place is not "so registered" for the purpose of § 17.

Mohammadu Sali v. Suaris * followed.

In execution of a decree against one Albinu the 1st defendant seized an undivided $\frac{1}{8}$ share of a land called Dawatagahawatte, whereupon the plaintiffs preferred a claim to that share. The District Judge of Negombo (R. G. Saunders Esq :) thought a partition action would settle the dispute and accordingly ordered the plaintiffs to bring a

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* MOHAMMADU SALI *v.* SUARIS.

No. 4547 D. C. KALUTARA.

Present : **Wood Renton and Grenier J. J.**

4th December 1911.

De Sampayo K. C. for the appellant.

VanLangenberg (with Balasingham) for the respondent.

Wood Renton J.—The plaintiff-respondent in this action claimed the partition of the land described in the plaint, allotting to himself a $\frac{1}{4}$ share by right of purchase on deed No. 4991 dated 27th March, 1910, and registered on 30th March in the same year. The added defendant-appellant intervened in the action claiming to be entitled to the same $\frac{1}{4}$ share by right of purchase from the respondent's vendor on deed No. 9071, dated 17th February, 1910, and registered on 21st February, 1910. The learned District Judge held that the lands conveyed by the two deeds were identical. But he also held that the respondent's deed, although later in date and in registration, was entitled to priority over the deed of the appellant because the latter deed had been registered in the wrong folio through the negligence of the appellant himself. "It appears" said the District Judge "that the defendant's deed was registered under a different "folio than the one in which it would have been placed if the name, extent, "and boundaries had been the same as those appearing in the plaintiff's "deed." This finding is supported by the evidence. and the only point that we have here to decide is whether the District Judge was right in

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partition action. The plaintiffs, thereupon, instituted a partition action and prayed that the share in question be allotted to them, alleging that Marthina and her husband Sardial, the original owners of the said share, transferred the same to one Pelis Paaris by deed No. 10566, dated 16th February, 1906, and registered on the 5th June, 1907, and that the transferee by deed No. 2023 date 21st May, 1909, sold and conveyed the same to the 1st plaintiff. The 1st defendant filed answer alleging that the said share was sold in execution against Marthina, and purchased by one Siadoris, who obtained a Fiscal's conveyance No. 2637 dated 16th August, 1894 (it was conceded in the Court below that this deed was registered in the wrong folio), and that Siadoris conveyed the same to Albinu by deed No. 9405 dated 1st June 1904 and duly registered, and that Albinu, with a view to defraud the 1st defendant, sold the same to the 3rd defendant after the seizure and before the institution of this action, and he therefore asked that the plaintiff's action be dismissed. The

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law in holding, as he did, that the effect of the mistake was to deprive the appellant of the benefit of his prior registration. In my opinion that question must be answered in the affirmative. The view of the law taken by the District Judge is strongly supported by the language of § 15 (1), § 16 and § 17 of the Land Registration Ordinanee 1891 (No. 14 of 1891). § 15 (1) requires the Registrar to prepare and keep books "for the "registration therein of any deed which may be brought to him for "registration as hereinafter provided ; allotting to each book some defined "division of the province or district, so that every deed relating to lands "situate therein may be registered therein in such manner as to facilitate "reference to all existing alienations or incumbrances affecting the same "land." § 16 provides that all the categories of deeds which are enumerated in it "shall be registered in the branch office of the district in which such "land or property is situate ; that is to say, in the books mentioned in the "preceding section"; and § 17 deprives of the benefit of registration deeds which are not "so registered ", unless there has been fraud or collusion in obtaining the rival deed, or in securing the prior registration. There is a suggestion in the petition of appeal that the plaintiff-respondent has been guilty of fraud in the present case. But there is no issue as to fraud, and the learned District Judge, while he was obviously somewhat suspicious of the respondent's proceedings, has held that there is no clear proof that he had, in fact, obtained his deed fraudulently. That being so, I do not think that it would be fair to allow that point to be raised against the plaintiff respondent now. The case, therefore, depends on the construction of Ordinance No. 14 of 1891, the effect of which has just been stated. It seems to me that the District Judge has interpreted the law correctly. In view of his findings on the facts, particularly as to the appellant's negligence, I think that the appeal should be dismissed with costs.

Grenier J.—I agree.

3rd defendant disclaimed title. The learned District Judge held that the registration of the Fiscal's Conveyance in the wrong folio did not amount to registration under the Ordinance and that the plaintiffs' deed therefore had priority. The 1st defendant appealed.

Samerewickrame for the 1st defendant-appellant.—The provisions of § 23 of Ord. 14 of 1891 have been complied with. The Fiscal's conveyance in favour of Siadoris contains an accurate description of the property affected thereby and the respondent cannot complain that he was misled by the mere registration of the deed in the wrong folio. [*Lascelles C. J.*. But § 24 requires that the deed shall state the volume and folio of the register in which such property has been previously registered.] It is impracticable to do that in Fiscals' conveyance because the Fiscal often sells against the wish of owners and is not likely to get access to the deeds. The transferee has done everything that could have been done by him, and he should not be prejudiced by the fault of the Registrar in registering the deed in the wrong folio. [*Grenier J.* Have you any status in this case ?] The judgment-debtor is seeking to defraud us and we are well within our rights, in asking that our interests be safeguarded.

H. A. Jayewardene (with *Jayetileke*) for the plaintiffs respondents.—The provisions of § 24 are imperative. There is no exception in the case of Fiscal's transfers and therefore the deed in question cannot be considered to be "duly" registered. A wrong registration where it is the fault of the Registrar of deeds founds an action of damages against him but deprives the creditor of preference (see *In re Carter-Leibbrant and Geyer v. Dickson & Burnies* [1]) The appellant has no status in the present action. He asks that the 3rd defendant be allotted the share in question but the 3rd defendant disclaims title.

1. 2. Menzies 335 at p. 340

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Lascelles, C. J.

Grenier J. referred counsel to the case of *Mohammadu Sali v. Suaris*[1] where it was held that the registration of a deed in the wrong folio does not amount to registration under the Ordinance.

Samerewickrame in reply.

c. a. v.

Lascelles C. J.—I entirely concur in the judgment of my brother Grenier. The question of law involved in the appeal is whether a deed which has been registered in the wrong folio is void as against parties claiming an adverse interest on valuable consideration by virtue of a subsequent deed which has been duly registered. On the construction of the Ordinance it is clear that the privilege which § 17 Ordinance No. 14 of 1891 attaches to registered deeds applies only to deeds which have been registered in accordance with the preceding sections of the Ordinance. The words of § 17 are "every deed...... unless so registered shall be deemed void......" Section 15 expressly provides that the Registrar shall prepare and keep books for the registration of deeds "allotting to each book some "defined division of the province or district so that every "deed relating to lands situated therein may be registered "therein in such manner as to facilitate reference to all "existing alienations or encumbrances affecting the same lands."

It is clear that a deed which is not registered in the proper place is not "so registered" for the purpose of § 17.

From another point of view the decision embodied in the judgment of my brother Grenier is the only one which would satisfy the equity of the case. I do not desire to say anything here on the ultimate responsibility of the Registrar for mistakes, such as that which has occurred here ; but it is apparent that an error of this nature may involve the person

1. *(1912) 1 C.A.C. 85.*

or persons interested either in the erroneously registered deed or in the subsequent duly registered deed, in serious loss. As between these two classes of persons it is equitable that the loss, if any, should fall on the former class. For it is possible for the person who registers a deed to see that it is registered in accordance with the Ordinance, whilst a subsequent purchaser or mortgagee is powerless with regard to the proper registration of previous deeds. The immediate loss, if any, should therefore fall on those interested in the deed which has been improperly registered.

Grenier, J.—This is a partition action. The contest is between the first defendant who is the appellant, and the plaintiffs who are the respondents, the share in dispute being an undivided $\frac{1}{8}$th of the land sought to be partitioned. It was admitted that Marthina was the owner of this share. The plaintiffs' case was that Marthina and Sardial her husband transferred the share to Pelis Paaris by deed No. 10566 dated the 16th February 1906 and marked P[1], and that the transferee by deed No. 2023 dated 21st May, 1909 and marked P[2] conveyed to the Ist plaintiff the wife of the 2nd plaintiff. Both P[1] and P[2] are duly registered.

The 1st defendant's contention was that before the sale to the 1st plaintiff the share in question was sold in execution against Marthina and purchased by Siadoris Appu who sold it to Alvinu Appu who conveyed it to Migel Perera the 3rd defendant. The purchase by Siadoris was on the 26st August 1894, and the purchase by Alvinu was on the 1st June 1904. It would appear that the 1st defendant brought an action No. 17442 in the District Court of Negombo against Alvinu and seized in execution the $\frac{1}{8}$ share when the plaintiff claimed it. After the seizure it was that Alvinu conveyed to the 3rd defendant. It will thus be seen that the 1st defendant has absolutely no right whatever to the share in question, nor, as far as I can see, has he any kind of interest in it. The 3rd defendant disclaims all title to the share, and this being a partition action the 1st

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defendant has no status in it unless he can show that he is entitled to a share in the land which is the subject of partition. In this state of the facts plaintiffs are bound to succeed, but there was a question of registration raised which, I think must be decided in favour of the plaintiffs. Both P[1] and P[2] to which I have already referred were duly registered. The Fiscal's conveyance in favour of Siadoris who purchased on the 26th August 1894 bears no evidence on the face of it of any registration, but it was apparently conceded in the Court below that the deed was registered but in another folio. The District Judge found that no registration of the Fiscal's conveyance in favour of Siadoris appeared in the list of incumbrances, and that the boundaries were different from the boundaries given in the other deeds. In the "Land Registration Ordinance" No. 14 of 1891, express provision is made for the registration of deeds in a set of books kept for that purpose, to each book being allotted some defined portion of the district or districts or part thereof in manner provided by § 15 (1) which declares the object in the following terms :—

"So that every deed relating to lands situate therein "may be registered so as to facilitate reference to all "existing alienations or incumbrances affecting the same "lands."

Now § 17 enacts that every deed unless so registered shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent deed which shall have been duly registered as aforesaid. There are certain provisos to § 17 with which we are not concerned in this case. In view therefore of the express provisions of §§ 15 (1), 16 and 17 it is clear that as the Fiscal's conveyance in favour of Siadoris dated the 26 August, 1894 was registered in the wrong folio, it must be considered void as against the conveyance by Marthina to Pelis Paaris dated the 16th February 1906, (P[1]) which was duly registered in the right

folio, and the conveyance by Pelis Paaris of the 21st May, 1909 which was also duly registered and in the right folio. It is unquestionable that the interest that the plaintiff claims is an adverse interest within the meaning of § 17.

In case No. 170 D.C. Kalutara 4547 [1] which wasdecided by my brother Wood Renton and myself (S. C. Minutes 4th December, 1911) we construed §§ 15 (1), 16 and 17 of Ordinance No. 14 of 1891 in the same way as I have construed them here. It does not seem possible to place any other construction on those sections.

I would dismiss the appeal of the 1st defendant with costs in both Courts.

Appeal dismissed.

Proctor for appellant—*C. J. Edirisinghe.*
Proctor for respondents—*H. A. Jayetileke.*

FULL BENCH.

SILVA *v* SILVA *et al:*

No. 4967, D. C. Matara

Present: **Lascelles C. J., Wood Renton & Grenier J. J.**

28th February, 1912.

Partition action—Interlocutory decree for a partition—Power of a Judge to alter or modify it—§§ 189 and 207 Civil Procedure Code —§ 4 of Ordinance 10 of 1863.

Where there has been an interlocutory decree for a partition, a Court of first instance may not set it aside and order a sale, however expedient, on the evidence, a sale may be.

Per Wood Renton J.—Such an order can be made by the Supreme Court alone.

Semble,—An interlocutory decree for a partition is a decree within the meaning of § 207, and, therefore, can only be modified in accordance with the provisions of § 189 of the Civil Procedure Code.

Silva v Silva [2] followed.

1. (1912) 1 C.A.C. 85. 2. (1910) 13 N.L.R. page 87.

Silva *v.* Silva

This was a partition action in which the District Judge of Matara, after satisfying himself that the land was owned and possessed in the shares shown in the plaintiff's pedigree, entered an interlocutory decree for a partition of the land, on the 8th December, 1910. As the parties were not agreed with regard to the scheme of partition the District Judge thought it impossible to partition the land to the satisfaction of all parties and he therefore directed a sale of the land and a decree was entered up accordingly on the 23rd December, 1911.

The appeal is against this order.

Vernon Grenier (with *H. A. Jayewardene*) for the 6th and 7th defendant's-appellants.—It was not competent for the learned District Judge to order a sale because there was an original decree for a partition of the land entered by him. A Court of first instance has no inherent power to vacate a decree even when it has been surprised into the making of it by fraud, collusion or mistake of fact (see *de Silva v. Pannasamy Pulle*[1]) [*Wood Renton J.* You will grant that the Supreme Court has the power to direct a sale.] Yes, that would be so. An interlocutoy decree for a partition is a decree within the meaning of § 207 and, can, therefore, only be modified in accordance with the provisions of § 189 of the Civil Procedure Code (see *Silva v. Silva*[2])

De Sampayo, K. C. for the plaintiffs-respondents —A decree in a partition action is a declaratory decree. Once the Court decrees a person entitled to a certain share, it would certainly not be competent for the Court to vacate that decree and declare another person entitled to that share; but whether the decree should be executed by partition or by sale is purely a ministerial matter and the Court may, in its discretion, choose the most convenient manner of executing the decree [*Wood Renton J.* The case of *Silva v. Silva*[2] appears to me to be against you.] The question of

1. (1909) 1 Cur: L. R. 226. 2. (1910) 13 N. L. R. 87.

fact involved in that case was one of title and not of procedure.

Allan Drieberg for the 8th defendant-respondent.

Vernon Grenier in reply.

c. a. v.

Lascelles C. J.—This is a partition action. On the 8th of December, 1910, the District Judge of Matara found that the land in question was owned by the persons in the shares shewn in the plaintiff's pedigree, and an interlocutory order was entered accordingly. Difficulties then arose with regard to the scheme of partition and it was ultimately found impossible to partition the land to the satisfaction of all parties. The District Judge after inspecting the land and considering the different proposals for partition directed a sale of the land and a decree was drawn up accordingly on the 23rd October 1911.

It is now contended by the appellants that it was not open to the District Judge to order a sale of the property and thereby, in effect, to vary the earlier interlocutory order.

After the judgment of the Full Bench of this Court in *Silva v. Silva*[1], I do not think that it is possible to contend that it is open for a Judge who has made a preliminary decree in an action or for his successor to alter or modify the preliminary decree except subject to and in accordance with § 189 of the Civil Procedure Code.

In the present case it seems clear that the learned District Judge in directing a sale acted in the best interests of the shareholders as a whole. And in order to remove any technical objection to his carrying out a sale, if he still considers that a sale is to the advantage of all the shareholders, I would set aside both the final and interlocutory decree and remit the case to the District Judge to make such interlocutory and final orders as he may consider advisable after hearing in each case any further objection which any of the parties may put before him.

1. *(1910) 13 N. L. R. 87.*

Grenier, J. Wood Renton, J.

I would make no order with regard to the costs of this appeal and would leave the other costs in the discretion of the District Judge.

Grenier J.—I agree to the order proposed.

Wood Renton J.—I quite agree that in this case a satisfactory partition is impracticable, and that the Supreme Court, on the terms proposed by My Lord the Chief Justice, should set aside the interlocutory decree for partition, and direct a sale.

I desire however, to say that, in my opinion such an order can be made by the Supreme Court alone. I do not think that where, as here, there has been an interlocutory decree for a partition, the proviso to § 4 of Ordinance No. 10 of 1863 or any other section in that Ordinance enables a Court of first instance to set it aside, and order a sale, however expedient on the evidence a sale might be. We are bound on this point by the decision in *Silva v. Silva*[1] It is true, as Mr. de Sampayo pointed out, that the question of fact involved in that case was one of title, and not of procedure. But the *ratio decidendi* clearly was that an interlocutory decree for a partition is a decree within the meaning of § 207, and, therefore, can only be modified in accordance with the provisions of § 189, of the Civil Procedure Code.

Case remitted.

Proctor for Appellants—*C. D. Serasinghe.*
Proctor for Plaintiffs Respondents—*G. E. Keunenan.*
Proctor for 8th deft.-Respondent—*C. H. B. Altendorff.*

1. *(1910) 13 N. L. R. 87.*

MUDALIHAMI *v.* PUNCHI BANDA *et al.*

No. 219 C. R. Gampola.

Present : **Lascelles, C. J.**

28th February 1912

Promissory Note—Joint liability—Judgment by default against one defendant no bar to action continuing against co-defendant—Whether English Law of procedure applies to actions on Bills of Exchange and Promissory Notes—Procedure of such actions regulated by the Civ. Pro. Code.—Judgment by default entered by Court not to deprive party of his remedy —Civil Procedure Code § 30—English rules O. xiii, r. iv—*Ordinance 5 of 1852 § 2.*

Section 2 of Ord : 5 of 1852 cannot be construed as introducing any part of the English procedure into actions on bills of exchange and promissory notes.

These actions are regulated by the Civil Procedure Code.

There is no provision in the Civil Procedure Code which prevents a plaintiff in whose favour judgment by default has been entered against one of several defendants who are jointly liable, from continuing his action against the other defendant.

Even according to the English law read with o. xiii. r. iv.☆ of the Rules and Orders, a plaintiff suing persons jointly liable is allowed. where one of several defendants fail to appear, to enter final judgment against those who have failed to appear without prejudice to his right to proceed with his action against those who have appeared.

Under § 30 of the Civil Procedure Code, the Court is not obliged to pass a decree for default against a defendant for failing to appear provided that one defendant at least has appeared. But where the Court has elected to order judgment to be entered against a defendant by default, a judgment so entered should not deprive the plaintiff of his remedy against the other defendant.

In this case the plaintiff as the endorsee of a promissory note sued the two defendants, who were the makers. On the day fixed for the 2nd defendant to file answer she was absent, and the Court ordered judgment to be entered against her by default, and fixed the case for trial as against the 1st

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☆ O XIII. r IV is as follows :—Where the writ of summons is endorsed for a liquidated demand whether specially or otherwise, and there are several defendants, of whom one or more appear to the writ and another or others of them fail to appear, the plaintiff may enter final judgment, as in the preceding rule, against such as have not appeared and may issue execution upon such judgment without prejudice to his right to proceed with the action against such as have appeared.

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defendant. Two of the issues on which the parties went to trial were:

(1) Is the note in fact a joint and several note or a joint note ?

(2) If joint, can plaintiff maintain the action, judgment having gone against one defendant on the note ?

The learned Commissioner of Requests held that the note was a joint one and that as judgment had been entered as against the 2nd defendant, such judgment was a bar to an action against the 1st defendant, and dismissed the plaintiff's action against the 1st defendant with costs. The plaintiff appealed.

A. St. V. Jayewardene for the plaintiff-appellant.—As both defendants were sued in the same action judgment against one was not a bar to a judgment against the other. The English law applicable to promissory notes was introduced to Ceylon by § 2 of Ord. 5 of 1852, which declared that the law applicable " shall be the same in respect of the said matters as would be administered in England in the like case *at the corresponding period*, if the contract had been entered into or if the act in respect of which any such question shall have arisen had been done in England . . . ." The law of England as at present existing would be the law applicable. According to the English Common Law, each of the makers of a joint promissory note is liable for the whole debt, but a judgment obtained against one, although unsatisfied is a bar to an action against the others (See *Manuel Istaky v. Sinnatamby* [1]); this principle was held applicable even where the plaintiff had obtained judgment by consent against one of the defendants (See *McLeod v. Power* [2]). But the Common Law on this point has been modified by the English Rules and Orders and the English Law on the point *at the corresponding period* must be taken to be the Common Law as modified by the English Rules and

1. *(1910) 13 .N.L.R. 284.* 2. *(1898) L.R. 2 Ch. 295.*

Mudalihamy v. Punchi Banda

Lascelles C. J.

Orders. [*Lascelles C. J.* The English Law you refer to, appears to be mere rules of procedure. Do they apply here ?] It is submitted that the rules referred to are rules of procedure and should not be held applicable here. Our procedure is regulated by the Civil Procedure Code and there is no provision in that Code which would prevent the plaintiff from continuing the action as against the 1st defendant. Section 90 may have some bearing on the question, but in the present case judgment was entered without the knowledge or consent of the plaintiff and the act of the court should not prejudice him. The circumstance that the judgment by default was entered without the plaintiff being a party to it differentiates this case from *McLeod v. Power*[1]. Counsel here referred to the case of *Babapulle v Rajaratnam et al.*[2] The English Law, as modified by O. xiii. r. iv. of the Rules and Orders, enables a party in the position of the present plaintiff to continue an action against one defendant although judgment by default has been entered against another co-defendant.

The Respondent was not represented.

c. a. v.

Lascelles, C. J.—The plaintiff in this case sues as the endorsee of a note given by the defendants. On the 21st October, 1911 summons was reported served on the 1st defendant and the 2nd defendant was reported not to be found. The 1st defendant being absent, order was made entering judgment against the 1st defendant and striking the action off as against the 2nd defendant. On the 3rd October the order against the 1st defendant was vacated and he was allowed to file answer. On the 20th October the parties were present and the 2nd defendant, on whom notice had been served, was allowed to file answer before the 31st October. On the 31st the 2nd defendant was absent and had not filed answer. Thereupon judgment was entered against her by default. On the 19th December the learned commissioner held that the note was a

1. *(1898) L. R. 2 Ch. 295.* 2. *(1906) 5 N. L. R I.*

Mudalihamy v. Punchi Banda

Lascelles, C, J.

joint one, and that the judgment which already had been entered against the 2nd defendant was a bar to the claim against the 1st defendant and the action was accordingly dismissed as against her.

Now, even, if § 2 of the Ordinance No. 5 of 1852 be construed so as to make the English rules of procedure as well as the English law applicable to actions on promissory notes, the judgment could not be supported for by o. XIII. r. IV of the Rules of the English Supreme Court the plaintiff is allowed, where one of several defendants fail to appear, to enter final judgment against those who have not appeared, without prejudice to his right to proceed with his action against those who have appeared. But I think that § 2 of the Ordinance No. 5 of 1852 cannot be construed as introducing any part of the English procedure into actions on bills of exchange and promissory notes. These actions, like others, are regulated by the Civil Procedure Code. There is no provision in the Civil Procedure Code to the effect that a judgment by default against one of several joint defendants prejudices the plaintiff's right to proceed with the action against the other defendant. Section 90 of the Civil Procedure Code provides that where there are several defendants the Court shall not be obliged to pass a decree for default against a defendant for failing to appear, provided that one defendant at least appears. The decree against the 2nd defendant in the case appears to have been entered at the instance of the Commissioner and not at the instance of the plaintiff and it would be unreasonable and unfair that the plaintiff should be deprived of his remedy against the 1st defendant because the Judge, in a matter within his discretion, elected to order judgment to be entered against the 2nd defendant.

I set aside the judgment dismissing the action against the 1st defendant and direct the action to proceed against

1, *(1899) 4 N.L.R. 348.*

him in the ordinary course. The appellant is entitled to the costs of the appeal.

Judgment set aside and case sent back.

Proctor for Appellant—*T. B. Panabokke.*
Proctor for Respondent—*E. G. Jonklaas.*

SCHRADER *v.* JOSEPH.
No. 14782 C. R. Chilaw.
Present : **Lascelles C. J. & Grenier J.**
26th February 1912.

Civil Procedure Code—appearance of parties—Court of Requests—date of trial—default of appearance—absence of party when case called—judgment by default—Civil Procedure Code § 823 (1,) (2), (3).

The exact point of time at which a party who fails to appear in a Court of Requests is liable, if a plaintiff to have his action dismissed, if a defendant to have judgment entered against him, by default, is that at which the party is required to attend, and, if no time is fixed, the time when the case is called on for hearing.

A party in default has not the whole of the day of default for excusing his absence.

Marikar v. The Colombo Municipal Council [1] and *Hadjiar v. Kunjie* [2] over ruled.

The appeal was originally argued before Wood Renton J. and His Lordship referred it to a Bench of two Judges. The facts appear in the referring judgment of Wood Renton J. which is as follows :—

This is one of the numerous cases that come up in appeal owing to the default of parties or their legal advisers to appear on the day and at the time fixed for the hearing of actions in which they are concerned The trial, in the present case, was fixed for 7th December, 1911. The first defendant, who is the appellant, was absent when the case was called. So was his proctor, Mr. T. M. Fernando. The Commissioner of Requests, acting under § 823 (2) of the Civil Procedure Code, on a motion by the plaintiff respondent's counsel, directed judgment to be

1. *2 Browne 240.* 2. *(1903) 1 A. C. R. 3.*

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entered in the respondent's favour. On the same day the appellant's proctor filed an affidavit, and for the reasons stated therein moved, under § 823 (3) of the Civil Procedure Code, that the judgment entered in the respondent's favour should be re-opened, and the case fixed again for trial. Notice of this motion was issued to the respondent. The motion was argued on 8th December, and the Commissioner of Requests refused it with costs. The present appeal is brought against the refusal to allow the case to be re-opened. The Commissioner's decision is challenged in the petition of appeal on the ground that he was wrong in holding that a good case for the re-opening of the judgment had not been made out on the proctor's affidavit. The explanation which the proctor gave of his absence was that he did not come to Court on the day in question at the usual hour, namely, 10 a. m. as his wife was ill, that he intended coming to Court only when the Commissioner mounted the Bench, and that he had asked the appellant's witnessess to come and let him know as soon as the Commissioner had taken his seat in Court. He was duly informed of the Commissioner's arrival, and came to Court himself, but reached it only about five minutes after judgment had been entered in favour of the respondent. The proctor added that the appellant was not himself present in court, in as much as his evidence was not required, and he had told him not to attend. The learned Commissioner of Requests, in my opinion, rightly held on this evidence that no case for re-opening the judgment under § 823 (3) had been made out, in as much as the proctor had not shown "that he was prevented from appearing in due time by accident or misfortune or other unaviodable cause." There was no allegation that his wife's illness was sudden, or so serious as to prevent him from being in court in time, or in any event from having asked the Commissioner, either in writing or by the verbal application of some other proctor, to excuse his temporary absence. The appeal fails on this point—the only point taken in the court of Requests on the motion for re-opening judgment.

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Mr Samerewickrame, however, raised a fresh point on the appellant's behalf at the argument before me. He contended —and this point is taken in the petition of appeal—that the case did not come under § 823 (3) at all, but that under § 823 (2) the Commissioner had no power to enter judgment on the day of the appellant's default and that the appellant had the whole of the day of default on which to excuse his absence. In support of this contention Mr. Samerewickrame referred to the decisions of Moncreiff J. in *Marikar v. Colombo Municipal Council* [1] and of Wendt J in *Hadjiar v. Kunjie* [2] I refer this case to a Bench of two judges for the purpose of having the decisions above referred to re-considered. Apart from authority, the meaning of § 823 of the Civil Procedure Code seems to me to be clear. The cases above mentioned were decided under § 823 (1), which defines the procedure on default of the appearance of the plaintiff. But they are, in my opinion, equally applicable to § 823 (2), which deals with the default of appearance on the part of the defendant. § 823 (2) provides that "if upon the day specified in the "summons or upon any day fixed for the hearing of the "action, the defendant shall not appear or sufficiently excuse "his absence, the Commissioner, ... "may enter judgment by default against the defendant." The *ratio decidendi* of the two decisions on which Mr. Samerewickrame relied was that the language of the section gives the defendant the whole of the day specified in the summons or fixed for the hearing of the action for the purpose of appearing or excusing his absence, and that consequently judgment cannot be entered against him in default till the whole of that day has expired. In support of this view, reference was made to § 823 (4) which provides that "if upon the day "specified in the summons or upon any day fixed for the "hearing of the action neither party appears when the case "is called on, the Commissioner shall enter judgment

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"dismissing the plaintiff's action but without costs." With the greatest respect I do not think that the use of the words "when the case is called on" in clause 4 is sufficient to justify the highly artificial interpretation placed by the decisions in question on the language of clause 1, and by necessary inference also of clause 2. The practical results of such an interpretation of the law would be most serious. As we all know there is a wide spread carelessness in this Colony, on the part both of litigants and of their legal advisers, in the Courts of first instance with regard to the duty of being present and ready for trial when their cases come on for hearing in the ordinary course of things. If we are to adopt the interpretation of § 823 (1) and (2) laid down in the cases of *Marikar v. Colombo Municipal Council* [1] and *Hadjiar v. Kunjie* [2], Commissioners of Requests would very often find their work at a standstill. One party or other, in the majority of the cases fixed for the day, would be absent, and no order could be made until the following day. There is no suggestion either in clause (1) or clause (2) of § 823 of the Civil Procedure Code of any duty being imposed upon the Commissioner to stay his hand on default of appearance by the plaintiff in the one case, or by the defendant in the other. The words in both clauses "shall not appear or sufficiently excuse his absence" clearly point, I think, to default in appearance, or failure to furnish a sufficient excuse, when the case comes on for hearing, and the words "may enter judgment by "default against the defendant" in clause (2) are explained by the proviso which requires the Commissioner in land cases, and empowers him in any case in which he may deem it necessary or expedient, to hear evidence in support of the plaintiff's claim. The words in clause (1) "the plaintiff's action may be dismissed" are equally capable of explanation by a reference to the proviso "that if the defendant when "called upon under § 809 shall admit the claim of the

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"plaintiff, the commissioner shall enter judgment for the "plaintiff according to law". The construction of § 823 which I am venturing to suggest as a correct one, on the one hand prevents the work of Commissioners of Requests from being paralysed or impeded by default of appearance on the part of plaintiffs or defendants, and on the other hand, works no hardship or injustice to any litigant. If a plaintiff or defendant is unable to appear on the day fixed for the hearing of the case—and it is his duty, I think, where no special hour of attendance has been named, to be present in Court on any such day from the time when the Court sits till the case is disposed of—he may explain his absence before judgment is given. If, owing to his default, judgment is given against him, he may, if a plaintiff, apply under clause (5) for permission to institute a fresh action, and if a defendant, move under clause (3) to have the judgment against him opened. I have thought it right to express my opinion on the important question of practice raised by Mr. Samerewickrame's argument in appeal. But, as I have already said, I hold that the case must be referred to two Judges in order that it may be decided. As I have myself formed a strong opinion on the point, I desire to take no part in its decision.

Samerewickrame for the appellant.—The case comes under § 823 (2). If at a later stage of the day the party in default excuses his absence and the court is satisfied it will hear the case. *Marikar v. The Municipal Council of Colombo* [1]; *Hadjiar v. Kunjie.* [2] The words "sufficiently excuse his absence" in § 832 (2) contemplate the absence of the party at some point of time on the date of trial which he is enabled to excuse later. The object of fixing another day under § 823 (2) for *ex parte* trial is to afford an opportunity to the party in default to excuse his absence during the whole of the day. The words "when the case is called on for hearing" which are to be found in sub-section 4 are not to be found in sub-sect-

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ion 2 therefore the latter subsection gives the parties the whole of the day to appear.

Sansoni for the respondent was not called upon.

The following are the arguments of counsel for the respondent at the hearing before Wood Renton J.

Sansoni for the respondent.—"Sufficiently excuse" means excuse by letter or message when the case is called on and before order by default is made. If a party is allowed the whole day to appear then he will have no default or absence to " excuse " till the next day and parties desiring postponements have only to absent themselves till the last working hour of the day. If the appellants arguments are to prevail there would be two orders made by the Judge before a judgment by default is finally entered up; the first one on the day after the trial date, and tne second on any subsequent date refusing to vacate the first.

Lascelles C. J.—This has been referred to us by Mr. Justice Wood Renton in view of the decision of Moncreiff J in *Marikar v. The Colombo Municipal Council* [1] which was followed by Wendt J. in *Hadjiar* v. *Kunjie* [2].

The point referred to us turns on the construction of § 823 (2) of the Civil Procedure Code and raises the question as to the exact point of time at which a defendant, who fails to appear in a Court of Requests, is liable to have judgment entered against him by default. The material words of § 823 (2) are the following :—" If upon the " the day specified in the section or upon any day fixed for " the hearing of the action the defendant shall not appear or " sufficiently excuse his absence, the Commissioner, upon due " proof of services of summons, notice, or order requiring " such appearance may enter judgment by default against " the defendant." Then follows a proviso that in land cases

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and in other cases in which the commissioner deems it necessary or expedient to hear evidence in support of a plaintiff's claim he shall order him to adduce such evidence on a day to be fixed for that purpose.

The construction of sub-section (1) which relates to a default of appearance on the part of the plaintiff and is expressed in language which is almost identical with sub-section (2) was considered in the two above mentioned cases. There it was held that the plaintiff had the whole of the day fixed for his appearance within which to appear so that his action could not be dismissed until the expiration of that day. There can be no question but that the decisions under sub-sections (1) are equally applicable to section (2) so that the practical question for determination is whether the construction there laid down is correct and ought to be followed. Reading the section as a whole, and without reference to authorities, I should have had no doubt but that the words "If upon the day specified in the summons ". . . . . the defendant shall not appear " or sufficiently excuse his absence...." refer to default at the time, if any, at which the defendant was required to attend and, if no time was fixed, to the time when the case is called on for hearing. The section refers to default on the part of the defendant in doing something which he ought to do and there can be no doubt but that it is the duty of the defendant, in the absence of any rule of procedure to the contrary, to appear either at the time the case is fixed for hearing or when the case is called on. The practical inconvenience which would result from the construction of the section laid down in the two above mentioned cases has been clearly set out in the judgment of my brother Wood Renton. It is so great as to render it almost impossible for Commissioners of Requests to dispose of their cause lists in a prompt and business like manner.

The *ratio decidendi* in these two cases appears to have been the difference between the language employed in sub-

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sections (1) and (2) relating respectively to default on the part of the plaintiff and defendant and sub-section (4) relating to the case where neither party appears. The language employed in the latter section is "if upon the day "specified in the summons or upon any day fixed for hearing "of the action neither party appears *when the case is called on* "the commissioner shall enter judgment dismissing the "plaintiff's action but without costs". From the presence of the words "when the case is called on" in sub-section (4) and from their absence in sub-sections (1) and (2) it is argued that the default referred to in the last two sections does not mean failure to appear when the case is called on. The difference between the wording of sub-section (4) and sub-sections (2) and (3) is noticeable and difficult to account for, but I do not think that it could be fairly inferred from this difference of phraseology that it was the intention of the Legislature to introduce a rule which, as my brother Wood Renton has pointed out, is inconvenient, impracticable and contrary to the recognised lines of legal procedure Every other consideration appears to me to tell in favour of he construction of the section being so construed that if a plaintiff fails to appear at the proper time, namely, at the hour fixed for trial or when the case is called on, his action is liable to be dismissed subject to his right under sub-section (5) to institute a fresh action if he satisfies the commissioner that he was prevented from appearing from accident, misfortune or other unavoidable cause ; and in the same way that a defendant is liable to have judgment entered by default against him if he does not appear at the appointed time or when the case is called on subject to his rights under sub-section (3) to have the judgment set aside on satisfying the commissioner that he was prevented from attending by similar unavoidable cause. It is a sound principle of construction that, in all cases open to doubt, the intention which is most argeeable to convenience and established legal principles should be presumed to be the true one. I do not think that the words "sufficiently excuse

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"his absence" in sub-sections (1) and (2) stand in the way of this construction of the section, for it is quite possible for a plaintiff or defendant, who is prevented from attending by some unavoidable cause, to bring the fact to the notice of the commissioner either before, at, or immediately after the time when the case is called on.

With the greatest respect for the learned Judges who decided *Marikar v. The Colombo Municipal Council*[1] and *Hadjiar v. Kunjie*,[2] I am unable, for the above reasons, to adopt their reading of the section under consideration which I think has been correctly expounded by my brother Wood Renton with whom I agree that the appeal in this case ought to be dismissed with costs.

Grenier J.—I entirely agree with my Lord and my brother Wood Renton in the construction they have placed upon § 823 (2) of the Civil Procedure Code. At the argument I think I expressed myself strongly in favour of such a construction, and I have had no reason since to change my opinion. If the construction relied upon for the appellant were to be adopted, it would be very difficult, if not thoroughly impracticable, to carry on the work in Courts of Requests. I would dismiss the appeal with costs.

Appeal dismissed.

Proctor for Appellant—*T. M. Fernando.*

Proctor for Respondent—*S. C. Sansoni.*

1. *2 Browne 240.* 2. *(1903) 1 A.C.R.3.*

VELLASAMYPULLE *v.* THE UPLANDS TEA ESTATES OF CEYLON LTD.

No. 21178 D.C. Kandy.

Present : **Lascelles C.J. and Grenier J.**

29th February 1912.

Stamp duty—claims in convention and reconvention—aggregate amount —practice of Courts.

Where in an action the defendant sets up a claim in reconvention the stamp duty leviable is calculated upon the value of the claim in convention or reconvention whichever happens to be the larger, and not on the aggregate amount of both the claims.

In this case the plaintiff sued the defendants for the recovery of a sum of Rs. 27,686. 84. The defendants claimed a sum of Rs. 21,412. 62 in reconvention. Their proxy was stamped according to the value of the plaintiffs claim that being larger than the claim in reconvention. The District Judge held that the proxy was insufficiently stamped and he ordered the defendants to pay extra stamp duty on their claim in reconvention. The defendants appealed,

Elliot for the defendants-appellants.—It is never the practice of the Courts to stamp the pleadings on the aggregate value of the claims in convention and reconvention. The practice is to levy stamp duty on the larger of the claims.

Walter Pereira K.C, S-G. for the Crown.—A claim in reconvention has the same effect as a plaint in a cross action Civ. Pro: Code § 75 (e). This is not a set off which may not require stamp duty. see *Pothier bk. 3 chap. IV § 3.*

Elliot in reply.—This is only an answer according to the schedule to the stamp Ordinance No. 22 of 1909. It cannot be said to be a plaint and answer at the same time.

c. a. v.

Grenier J.—The appeal in this case is an *ex parte* one, and has been taken from an order made by the District Judge on the 13th October, 1911, in which he held that the proxy granted by the appellants to Mr. J. D. Jonklaas to appear and defend in the action was insufficiently stamped.

Vellasamypulle v. The uplands Tea Estates etc.

Greneir J.

The District Judge was of opinion as expressed in his letter to the Registrar of this Court that the reason for his requiring the defendants to pay extra stamp duty on their proxy was because they claimed in reconvention a sum of Rs 21,412·61 and interest so that the subject matter in dispute was enhanced by that amount. From the proxy given by the appellants to Mr. Jonklaas I find that the claim in reconvention amounts to the sum of Rs. 21,412·61 and interest. The District Judge has lumped together this sum and the sum claimed in convention, namely Rs. 27,686·84 and has ordered the appellants to stamp their proxy for the aggregate amount namely Rs. 49,099·45. In my opinion the order is wrong. The practice in the District Court of Colombo is to levy a stamp duty on the claim in reconvention, if, as it stands, it is in excess of the claim in convention, and not on the aggregate amount. That seems to be the right principle to adopt in cases of this kind. The order appealed from must be set aside, and the case sent back for proceedings in due course. There will be no costs of this appeal.

Lascelles C.J.—I agree with the judgment of my brother Grenier. *Set aside.*

Proctor for appellants—*J. D. Jonklaas*

FULL BENCH.

KANEPATHIPILLAI *v.* MOHAMMADUTAMBY LEVVAI *et. al.*

No. 3398, D. C. Batticaloa.

Present : **Lascelles C. J., Middleton Wood Renton & Grenier J. J.**

10th March. 1912.

Registration—Priority—Deed of donation—Deed for valuable consideration—Registration Ordinance No. 14 of 1891, § 17.

A deed of donation which is prior in date to a deed for valuable consideration but is registered after the registration of the latter deed is void as against the latter.

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Per Lascelles C.J. The Registration ordinance it was urged was not intended to and does not convert into valid conveyances instruments which are *per se* inoperative. But this is precisely what the ordinance does in the majority of cases where the competition is between two deeds derived from the same source of title. The prior unregistered deed is deemed void as against the parties claiming an adverse interest under a subsequent registered deed for valuable consideration. The natural and inevitable consequence of this process is that instruments which would otherwise have been inoperative to pass title are clothed with validity. The principle con hardly be better put than by Mr. Justice Clarence in *Silva v. Sarohamy* [1] "where an owner of land conveys it to A for value and subsequently executes another conveyance of the same land in favour of B also for value it is true at the date of the second conveyance the owner has nothing left in him to convey. But by the operation of the ordinance B's conveyance overrides A's if registered before it. Unless the ordinance has this effect, it has none at all, and this seems the actual construction of the enactment."

Where a deed under which a person claims title is registered it is immaterial that the earlier deeds forming links in the title have not been registered.

Peris v. Perera [2] followed.

The facts material to this case are set out as follows in the judgment of Lascelles C. J: "The land which is the subject matter of this action belonged to one Paremecutty Sastry who by deed P[2] dated the 26th December, 1899 and registered the 28th November, 1910 donated the land to one Sinneppillai, who by deed P[1] dated 7th December, 1910 and registered on the 15th of the same month sold it to the plaintiff. Meanwhile Sastry by a deed of the 1st December, 1905, purported to revoke the donation in favour of Sinneppillai, but it is conceded that that deed was inoperative for that purpose.

Sastry by deed P[3] dated the 14th November, 1906, conveyed the land to Kadramtaamby who by deed P[4] also dated 14th November, 1906, re-conveyed the property to Sastry who by deed D[1] dated 30th, November 1909, and registered the 20th December of that year conveyed to the 2nd and 3rd defendants who are the present appellants. The question referred to us is that formulated by the first issue in the following terms:—

1 *Wendt's reports 383.* 2 *(1906) 10 N.L.R. 38.*

Kanepathipillai v Mohammadutamby Levvai.

1. Whether deed No. 730 of 30th November 1909 in favour of 2nd and 3rd Defendants has priority over deed No. 2103 of 26th December 1899 in favour of Sinneppillai by reason of registration."

The District Judge held in favour of the plaintiff and the defendants appealed.

Tisseveresinghe for the appellants.—The learned District Judge was wrong in relying on the case of *Kanapathipillai v. Kannachy* [1]. That case must be read with the judgments in *Kirihamy v. Kiribanda* [2] and *Aserappa v. Weeratunge et. al.* [3]. In *Kirihamy v. Kiribanda* [2] it was held that knowledge of the existence of a prior unregistered deed is not sufficient to deprive a person of the right to gain priority by prior registration of a subsequent deed. The case of *Silva v. Sarohamy* [4] concludes the point in my favour. Counsel also cited *C. R. Galle 156;* [5] *Kanapathipillai v. Veluppillai* [6]; *Hamidu v. Natchia* [7].

H. A. Jayewardene (with *J. W. de Silva* and *Cooray*) for the respondent.—Nothing passed to the appellants under their deeds as Sastry had already divested himself of title by the donation to Sinneppillai before he executed the transfer in favour of Kadramatamby. Registration would not create title where there was no title at all. The conflict is not between the deed of donation and D1 the deed upon which the defendants claim; it is between the deed of donation and Kadramatamby's deed. The latter was not registered and therefore the donation must prevail. [*Lascelles C. J.* would not the case of *Peris v. Perera* [8] cure the defect?] It would not; had Kadramatamby sold to a third person then that principle would apply. The competition is not between two deeds derived from the same source. Counsel also cited *Silva v. Gomes* [9] and *Kadravelu v. Perera* [10]

Tisseveresinghe in reply. *c. a. v.*

(1) (1910) 13 N.L.R. 166. 2. (1911) 14 N.L.R. 417.
3. (1911) 14 N.L.R. 284. 4. Wendt's Reports 383.
5. (1873) 2 Grenier C.R. 6. 6. (1887) 8 S.C.C. 111.
7. (1892) 2. C.L.R. 32. 8. (1906) 10 N.L.R. 38
9. (1909) 1 Cur. L.R. 96. 10. (1889) 9. S.C.C. 36.

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Lascelles, C.J.

Lascelles C. J.— This appeal has been referred to a Full Bench for decision.

The land, which is the subject matter of this action, belonged to one Paremecutty Sastry, who by deed P[2] dated the 26th December 1899 and registered the 28th November 1910, donated the land to one Sinnepillai, who by deed P[1] dated 7th December 1910 and registered on the 15th of the same month sold it to the plaintiff. Meanwhile Sastry by a deed of the 1st December 1905 purported to revoke the donation in favour of Sinnepillai, but it is conceded that that deed was inoperative for that purpose.

Sastry, by deed P[3] dated the 14th November 1906 conveyed the land to Kadramatamby who by deed P[4] also dated 14th November 1906 re-conveyed the property to Sastry, who by deed D[1] dated the 30th November 1909 and registered the 20th December of that year conveyed to the 2nd and 3rd defendants, who are the present appellants. The question referred to us is that formulated by the first issue in the following terms :—

"1. Whether deed No. 730 of 30th November 1909 in favour of 2nd and 3rd defendants has priority over deed No. 2103 of 26th December 1899 in favour of Sinnepillai by reason of registration."

In view of the terms of § 17 of the Land Registration Ordinance 1891 and the numerous decisions of this Court thereon I confess that the point reserved for consideration does not present any particular difficulty to me.

The competing deeds, as stated in the 1st issue, are, on the one side, the appellants' deed D[1] dated the 30th November 1909, and registered on the 20th December 1909, and, on the other side, the donation P[2] to Sinnepillai dated 26th December, 1899, and registered on the 28th November, 1910. Of these the former deed, though later in date, is prior in

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registration it is a deed for valuable consideration and there is no question of fraud or collusion. It follows, therefore, that the competing deed P^2 must be deemed void as against the appellants who claim an adverse interest under the deed D^1. Mr. Hector Jayewardene, who argued the case for the respondent with much ingenuity, advanced an argument which is frequently put forward with some appearance of plausibility in cases of this description. Sastry, he contended, when he conveyed to the defendants, had previously divested himself of title by his donation to Sinnepillai, so that nothing passed by his conveyance to the defendants.

The Registration Ordinance, it was urged, was not intended to, and does not convert into valid conveyances instruments which are *per se* inoperative. But this is precisely what the Ordinance does in the majority of cases where the competition is between two deeds derived from the same source of title. The prior unregistered deed is deemed void as against the parties claiming an adverse interest under a subsequent registered deed for valuable consideraticn. The natural and inevitable consequence of this process is that instruments which would otherwise have been inoperative to pass title are clothed with validity The principle can hardly be better put than by Mr. Justice Clarence in *Silva v. Sarohamy* [1]

"When an owner of land conveys it to A for value and subsequently executes another conveyance of the same land in favour of B also for value, it is true at the date of the second conveyance the owner has nothing left in him to convey, but by the operation of the Ordinance, B's conveyance overrides A's, if registered before it. Unless the Ordinance has this effect, it has none at all, and this seems the actual construction of the enactment."

This point is also clearly dealt with by Creasy C. J. as far back as 1873 in *C. R. Galle 151* [2]

1. *Wendt's Reports p. 383.* 2 *2 Grenier p. 6.*

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Mr. Jayewardene also contended that the true competition was not between the deeds D [1] and P [2] but between the conveyance to Kadramatamby and the latter deed. With regard to this contention it is to be observed in the first place that it is outside the issue on which the parties went to trial, which was as regards the relative priority of deeds D [1] and P [2] But the contention in my opinion is not sound. The adverse interest which the appellants claim is obviously in virtue of their own deed D [1] and they are entitled by the terms of § 17 to have the benefit of the prior registration of the deed. The non-registration of the conveyance by Sastry to Kadramatamby is not material, for in *Peris v. Perera* [1] it was held that where a deed under which a person claimed title is registered, it is immaterial that earlier deeds forming links in the title have not been registered. Then it was urged that the appellants must be taken to have derived their title not from Sastry, but from Kadramatamby so that the competition is not between two deeds derived from the same source. This view is, in my opinion, quite fallacious. Kadramatamby had no title save that which he derived from Sastry : it is true Sastry's deed to Kadramatamby at the time did not pass title : it was ineffective until the registration of the appellant's deed placed them in a position of priority over the claimants under the donation to Sinnapillai. The case of *Kanapathipillai v. Kannachi* [2] was relied on by the learned District Judge as an authority for his ruling that the prior registration of the defendant's deeds did not give them priority of title. But this case really turned upon the question of notice, and on that point it must be read in connexion with the subsequent judgment of this Court in *Aserappa v. Weeratunga et al.* [3]

In my opinion the appeal should be allowed and the action dismissed with costs here and in the Court below.

Middleton J. In my opinion the point in this case is covered by authority and I do not think it necessary to add

1 (1906) 10 N.L.R. 38 2. (1910) 13 N.L.R. 166.
3 (1911) 14 N.L.R. 284.

anything to the judgment of my Lord which I have had the privilege of perusing and with which I entirely concur.

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Wood Renton J.—This case was argued before my brother Grenier and myself on 9th October, 1911. At the close of the argument we sent it back to the District Court for further evidence and any expression of opinion that the learned District Judge desired to offer on the original and further evidence as to whether or not the plaintiff respondent had established title by prescription. The District judge has recorded the further evidence placed before him by the parties, and has expressed this opinion that the plaintiff respondent has not established title by prescription. The appeal was argued again on 29th February, and now comes before the Full Court for final adjudication. The appellant's counsel is, of course, quite satisfied with the view taken by the District Judge on the issue as to prescription. The respondent's counsel did not challenge it, and I see no reason to think that it is wrong.

Middleton & Wood Renton J.J.

The case as presented by Mr. Cooray to my brother Grenier and myself at the recent argumeut had to be decided on the following simple facts. The action is one brought by the respondent against the appellants and others for a partition of a land called Kallady Kandam. Of this land the respondent claims an undivided 3 acres under the following title. These 3 acres originally belonged to Paremecutty. Sastry. By donation deed P [2] dated 26th December, 1899, and registered on 28th November, 1910, by the respondent, Paremecutty Sastry donated the 3 acres in question to a woman Sinnepillai who sold them to the respondent by deed P [1] dated 7th December, and registered 15th December, 1910. Paremecutty Sastry had purported to revoke the donation in favour of Sinnepillai by deed No. 184 dated 1st December 1905. It was held, however, by the District Judge—and his finding on this point has not been contested—on the authority of the case of *Kanapathipillai*

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v. Kannachi [1] that that deed of revocation, not having been effected through the Court, was void. Paremecutty Sastry, however, subsequently to the date of revocation, namely by deed D [1] dated 30th November, and registered on 20th December, 1909, sold the 3 acres in dispute to the 2nd and 3rd defendants appellants. At the date of that sale he had divested himself of his title to the property in question. But the appellant's deed is prior in the date of its registration to both the donation deed in favour of Sinnepillai and her transfer deed in favour of the respondent. The question that we had to decide was whether, in spite of the fact that, at the date of his deed of transfer to the appellants, Paremecutty Sastry had no title to the property disposed of by that deed, it acquired priority by virtue of its prior registration over the deed of donation to Sinnepillai and her deed of transfer to the respondent. It appears to me that on the authorities we are bound to answer this question in the affirmative. We are not called upon here to inquire what the legal position would be if the subsequent purchaser had derived his title from a Fiscal's conveyance, which, in terms, passes only the right, title, and interest of the judgment debtor. We are in presence of a conveyance purporting to pass a clean title to purchasers for value and without notice. The cases of *C. R. Galle 151* [2], *Silva v. Sarahamy* [3] and the language of Dias J. and Clarence J. in *Canavadipillai v. Veluppillai* [4], a decision of the Full Bench as then constituted, seem to me to be binding authorities in favour of this view, and I think that they are sound in principle.

At the argument before the Full Court, Mr. Hector Jayewardene raised, and argued with very great ability, a fresh point on the following additional evidence. After the revocation of the deed of donation, Paremecutty Sastry

1 *(1910) 13 N.L.R. 166.* 2 *(1873) 2 Grenier C.R. 6.*
3 *(1883) Wendt 383,384.* 4 *(1887) 8 S.C.C. 111.*

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transferred the land in suit to one Kadramatamby by deed No. 467, dated 4th November, 1906. On the same day he took a re-transfer of the land by deed No. 468. In his transfer to the appellants, he recited this deed of re-transfer. Neither of these intermediate deeds was registered. Mr. Jayewardene argued that, by his transfer to Kadramatamby, Paremecutty Sastry extinguished his original title, that by the deed of re-transfer he started a new title in himself of which Kadramatamby was the source, that this was the title which he conveyed to the appellants, that it was not adverse to the interest acquired by the respondent from Sinne Pillai, and that consequently it could not acquire by registration priority over the respondent's deed from Sinne Pillai.

It must be observed that in his deed in favour of the appellants, Paremecutty Sastry does not convey solely on his deed from Kadramatamby. He sets out his original title and mentions the deed of re-transfer merely as a link in that title. I am unable to accept the view that any break in the chain of title was effected by the intermediate unregistered deeds Paremecutty Sastry conveyed no title to Kadramatamby, Kadramatamby re-conveyed no title. The source of the appellants' title was Paremecutty Sastry himself. The intermediate deeds were mere links in the chain of title from him. That being so, by virtue of section 17 of Ordinance No. 14 of 1891 (and see *Peris v. Perera* [1]), the prior registration of the appellants' deed wiped out the intermediate unregistered deeds, and the title derived by the respondent from Sinne Pillai on a deed of later registration, and clothed with legal force, as against the respondent, Paremecutty Sastry's deed in favour of the appellants, although at the date of the execution of that deed Paremecutty Sastry had no title to convey. Unless § 17 of Ordinance No. 14 of 1891 is interpreted in this way, I do not see how effect can be given to its language and intention at all.

1. *(1906) 10 N. L. R. 33.*

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I would set aside the decree under appeal and direct that the plaintiff-respondent's action should be dismissed with all costs of the action and of the appeal.

Grenier J.

Grenier J.—I agree with the rest of the Court, but I should like to add a few words in regard to my judgment in the case of *Kanapathipillai v. Kannachi,*[1] which the learned District Judge proposed to follow in deciding the present case. The question there that I discussed, was as to the effect of notice, and I expressed my opinion that a person who has actual notice of the existence of an instrument cannot get priority over it through the medium of the Registration Ordinance, as the attempt to obtain such priority amounted to fraud under the proviso to § 17 of Ordinance No. 14 of 1891. In saying so I followed the judgment of the Privy Council in *Crowbly v, Bergtheil*—See *Jayewardene's Law of Mortgage p. 84. I* expressed no decided opinion on the question of registration, nor did I hold any thing definitely on the point, although I held in effect that the Commissioner was wrong in deciding the question of registration in the way he did on the materials before him.

Decree set aside and plaintiff's action dismissed.

Proctor for Appellant—*J. A. Setukavaler.*

Proctor for Respondent—*J. Kadramatamby.*

1. *(1910) 13 N. L. R. 166.*

SILVA v. MARIKAR.

No. 5776 D. C. Negombo.

Present: **Lascelles C. J. & Grenier J.**

9th February 1912.

Civil Procedure Code §§ 241 and 247—claim to property seized—inquiry—absence of claimant—dismissal of claim—vacating order of dismissal—Consent of parties.

An order dismissing a claim to property seized in execution of a writ on account of the absence of the claimant on the day of the inquiry, may be vacated with the consent of the parties.

Muttu Menika v. Appuhamy [1] referred to.

Per Lascelles C. J. It would be a monstrous thing if a party were allowed to take advantage of his conduct in first consenting to the vacation of an order and then pleading that the order notwithstanding his consent to its vacation, was still in full force and effect.

This was a claim case. The District Judge having dismissed the claim of the appellant through a mistake, the Proctor for the appellant moved with the consent of the Proctor for tbe respondent that the order of dismissal be vacated. This motion was allowed. On the date of inquiry, however, Counsel for the respondent urged on the authority of *Muttu Menika* v. *Appuhamy* [1] that the order vacating the order of dismissal was invalid and that the order dismissing the claim was still in effect. The District Judge upheld this contention and refused to inquire into the claim. The appeal is against this order.

A. St. V. Jayewardene for the claimant-appellant.—The judgment-creditor's proctor having consented to the vacation of the order dismissing the claim and fixing the claim for inquiry, cannot now object to the claim inquiry being held. The appellant is now prevented from bringing his action under § 247, which he would have done if the respondent had not consented to the order of dismissal being vacated. A party to a civil case can waive the benefit of any order in his favour. The judgment in *Muttu Menika v. Appuhamy* [1], which the District Judge considers is binding on him, is not applicable to the present case as there the order of vacation was not made of consent.

Bawa K. C. for the judgment-creditors—respondents.—The court could not vacate the order of dismissal, even though the Proctor for the respondent consented, because

1 (1911) 14 N. L. R 329.

Silva v. Marikar

Lascelles C. J.

§ 247 makes such an order of dismissal final and conclusive. The appellants' remedy, if any, would have been to bring an action under § 247 as provided by the Code (See *Muttu Menika v. Appuhamy* [1]).

A. St. V. Jayewardene in reply.—The Code does not give an order in a claim inquiry any greater finality or force than a decree in any other action. It merely states that if no action under § 247 is brought such order shall be conclusive, that is, final between the parties in the same way as any ordinary decree. In civil cases, decrees can be opened up by consent of parties.

Lascelles C. J.—The facts which have given rise to this appeal are somewhat of an unusual nature. The appeal concerns an order made in certain claim proceedings. The journal entry under the 3rd August 1911, is, "Notice not served—Reissue for "30th August, 1911." On the 3rd August we find the proctors for the claimant were present, and the execution creditor and his proctor, Mr. Wijetunge, were also there. The entry is "Notice not served on "execution-debtor. Claimants in both claims absent. "Claims dismissed with costs Rs. 25/—. Fiscal informed.' Then on the 16th Angust we have the entry that Messrs de Silva and Perera for claimant move that the "Order dated 3rd August dismissing the claims preferred "in this case be vacated as on that date notices of the "claims had not been served on the judgment-debtor. "Notice of this motion must first issue on the execution-"creditor". Then on the next day, the 17th August, the entry is "Mr. Wijetunge for execution-creditor having "taken notice of the motion to vacate the order dismissing "the claims, Messrs de Silva and Perera for the claimant "move that the said order be vacated, and a date fixed for "the enquiry of the said claims with notice thereof to the "execution-creditor and the defendant." From the original notice of the motion it is clear that Mr. Wijetunge agreed

1. (1911) 14 N. L. R. 329.

Silva v. Marikar

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to the order vacating the previons order of the 3rd August. There is an entry in the order, apparently in his handwriting, and signed by him "I have no objection." Then, when the case came on for further enquiry, the advocate, who appeared for Mr. Wijetunge's client, objected that the order vacating the order of the 3rd August was invalid and that the order dismissing the claim was still in effect. The District Judge has acceded to that contention with the result that the appellant, owing to the change of front on the part of Mr. Wijetunge, was shut out from all redress. The learned District Judge appears to have relied on the judgment of this Court in the case of *Muttu Menika v. Appuhamy*[1]. But there is nothing in that decision, nor has any authority been cited to us, to show that an order dismissing a claim may not be vacated with the consent of the parties. The language of § 247 would not, in my opinion, support such a contention. It states that the order is to be conclusive, subject to the result of an action under § 247. That is, conclusive on the person on whom the order is binding. But there is nothing in the wording of the section to preclude such an order being vacated by the consent of the parties. I am, therefore, of opinion that the order of the 3rd August, by the consent of the parties, is a valid order, and that the order of the District Judge is wrong. It would be a monstrous thing if a party were allowed to take advantage of his conduct in first consenting to the vacating of an order, and then pleading that the order notwithstanding his consent to its vacation, was still in full force and effect. In my opinion the appeal ought to succeed, and the claim proceedings ought to be continued. The appellant is entitled to the costs of the appeal,

Grenier J.—I entirely agree.

Appeal allowed.

Proctor for appellant—*De Silva and Perera*
Proctor for respondent—*H. E. Wijetunge*

1 (1911) 14 N. L. R. 329.

T. M. FERNANDO *v.* THE DEPUTY FISCAL OF CHILAW.

No. 4348. D. C. Chilaw.

Prsent : **Lascelles C. J. & De Sampayo J.**

7th May 1911.

Civil Procedure Code § 258—application by proctor for stay or postponement of sale—Fiscal's fees—presumption that proctor was acting on behalf of client—personal liability of proctor—party liable.

When a proctor applies for a stay or postponement of a sale, the presumption is that he is acting on behalf of and with the authority of his client, and an order cannot be made against the proctor personally for Fiscal's fees. It is the party who is to be held responsible, if the sale is stayed or postponed on his behalf.

In execution of a decree for costs entered in this case in favour of the defendants, a property belonging to the plaintiffs was seized. Before the date of the sale the plaintiffs having paid the amount due to the defendant, the appellant who was the defendant's Proctor, wrote a letter to the Deputy Fiscal, Chilaw, asking him to return the writ to Court unexecuted. The Fiscal, in doing so, moved for a writ of execution against the appellant personally for the sum of Rs 22. being his recoverable fees, which the learned additional District Judge allowed with costs.

Against this order the present appeal was taken.

H. A. Jayewardene. for the appellant.—§ 258 of the Civil Procedure Code says that the Fiscal shall recover his fees from "the party at whose instance the writ shall be stayed." There is nothing in this section to indicate that a proctor who applies for a stay or postponement of a sale is personally liable. The presumption is that the the proctor acted on behalf of and with the authority of his client, and, therefore, it is the party who should be held responsible.

Allan Drieberg, for the Fiscal-Respondent.—The Fiscal could have declined to act without pre-payment of fees, and it is quite likely that he stayed the sale on the personal

T. M. Fernando v. the Deputy Fiscal of Chilaw

Lascelles C. J.

undertaking of the proctor to pay his fees. [*De Sampayo J.* Why did you not proceed against the party at whose instance the writ was stayed ?] Perhaps, because the proctor undertook to pay us. [*Lascelles C. J.* Is there any provision in the Code that the proctor is personally liable ?] No.

Lascelles C. J.—I am of opinion that the order appealed against is clearly wrong. Section 258 of the Civil Procedure Code provides that, in cases where the sale of property seized in execution is postponed or stayed at the request or with the concurrence of the party suing on the writ, the Fiscal or Deputy Fiscal shall recover half of the above fees on the estimated value of the property from " the party at whose instance the writ shall be stayed." Here the learned District Judge has made the order not against the the party, but against the proctor of the party. There is nothing in the Code which authorises an order of this nature to be made against the proctor. The presumption is that, when a proctor applies for a stay or postponement of a sale, he is acting on behalf of and with the authority of his client, and in default of any special provision in the Code an order cannot be made personally against the proctor. The Code is clear that it is the party who is to be held responsible for the Fiscal's fees, if the sale is stayed or postponed on his behalf. Whether on the materials before us an order could have been made against Mr. Fernando's client is a question which we are not here called on to decide. The order as it stands is clearly erroneous, and must be set aside. The appellant will have the costs of this appeal and also the costs of the motion in the District Court.

De Sampayo A. J.—I entirely agree.

Set aside

Proctor for appellant—*T. M. Fernando.*

Proctor for respondent—*N. J. Martin.*

SINNO APPU *vs.* PODINONA *et al*

No. 6749 C. R. Galle

Present: **Lascelles. C. J.**

15th May 1912

Estoppel—misrepresentation—minor—married woman—execution of mortgage by married woman without husband's consent—and by minor—misrepresentation by mortgagors—fraud—§ 6 of Ord. 15 of 1876—mortgage void ab initio.

A married woman, who by § 9 of the Matrimonial Rights and Inheritance Ordinance, 15 of 1876 cannot dispose of her immovable property *inter vivos* except with the consent of her husband, cannot be estopped from pleading coverture by any misrepresentation made by herself.

The same principle, is applicable, subject to certain exceptions and equitable considerations, to minors, who are under a common law disability as regards the disposal of their property.

It is a well settled principle of law that a party cannot by representation, any more than by any other means raise against himself an estoppel, so as to create a state of things, which he is under a legal disability from creating.

Referred to and followed :—*Canterbury Corporation v. Cooper* [1]; *Cannon v. Farmer.* [2]

Wijesooriya v. Ibrahimsa [3] differentiated.

In this case the defendants were sued as the legal representatives of one Balahamy, a married woman, and one Deonis, a minor, who had executed a mortgage bond in favour of the plaintiff. The defence was the coverture and the minority respectively of the mortgagors. The plaintiff alleged that Balahamy and Deonis had falsely represented themselves to be a widow and of full age respectively and thus induced him to lend them money on the mortgage bond put in suit. At the trial the issue was framed—"Was the plaintiff fraudulently induced to lend money on the mortgage bond ?"—and the learned commissioner held as follows :— "I find that the deceased Balahamy, and Deonis, did misrepresent themselves to be a widow and a major respectively at the time of borrowing the money from plaintiff, and that he was ignorant of the deceptions. In view of this I hold that the defendants, the heirs of the deceased, are debarred from deriving any benefit from the fraud of the deceased, as

1. *(1909) March to August L. T.* 2. *(1849) 3 Exch : Reports 986*
3. *(1910) 13 N. L. R. 195*

they would do if the plaint were dismissed on the legal grounds set out in the answer. A similar ruling as regards a minor guilty of fraud has already been given in a Supreme Court case reported in *13 N. L. R. 195*, and the case of a wife mortgaging her separate estate should be governed by the same principle"

Sinno Appu vs. Podi nona

Judgment was given for the plaintiff. The defendants appealed.

Bawa K. C., for the defendants-appellant, contended that the judgment was wrong as it contravened the well-known principle that estoppels cannot be availed of to over-ride the law of the land. In *Wijesooriya v. Ibrahimsa* [1] the principle was recognized, see the judgment of Middleton. J.; but it was not given effect to, as the plantiff there was trying to take advantage of his own fraud He also referred to *Silva v. Dissanayake* [2] and *Marie Cangany v. Kuppasamy Cangany* [3], where it was held that a mortgage by a woman married after the proclamation of Ordinance 15 of 1876 was invalid. There was no fraudulent misrepresentation in this case.

A. St. V. Jayawardene for the plantiff-respondent,—In the two cases last cited there was no suggestion of fraud, so that they have no application to this case. Here the Commissioner has held that "the deceased Balahamy and Deonis did misrepresent themselves to be a widow and a major respectively at the time of borrowing the money." As regards the minor, the point is concluded by authority. In *Wijesooriya v. Ibrahimsa*, [1] Hutchinson C. J. dismissed the appeal on the ground that although the sale of immovables by a minor without the authority of the Court is void, yet it would be valid and binding if the minor represented himself to be of full age, relying on a passage from *Maasdorp Vol I. p. 247.* Middleton. J. gave a similar reason for his decision. As regards a married woman there is no express decision, but in Ceylon the principle

1 *13 N. L. R. 195.* 2 *(1892) 2, C. L. R. 123.*
3 *(1906) 10 N.L R. 79*

Sinno Appu vs. Podi nona

Lascelles C. J.

that an estoppel cannot be applied with the object or result of altering the law of the land must be taken subject to certain qualifications. The law requires a conveyance of land to be notarially attested, but where a person falsely, represents himself to be the owner of land and sells the same, if he afterwards becomes owner of the same property, the law of estoppel prevents him from seeking to set aside the sale entered into by him, *vide* the illustration to § 115 of the Evidence Ordinance. But if, after he acquires title, he again sells to a third party, the latter obtains a better title than the first purchaser : *Don Carolis* v. *James* [1]

Bawa, K. C. in reply *c. a. v.*

Lascelles C. J.—This is an appeal from a judgment on a mortgage bond in which the defence was that one of the mortgagors, Balahamy, a married woman, had executed the bond without the consent of her husband, and that the other mortgagor Deonis, Balahamy's son, was a minor when he executed the instrument, The learned Commissioner has given judgment on the bond on the ground that there was misrepresentation on the part of the mortgagors. He accepts the evidence that Balahamy described herself as a widow to the notary and that Deonis stated that he was of full age. In my opinion the judgment of the learned Commissioner cannot be sustained. By § 9 of the Matrimonial Rights and Inheritance Ordinance 1876 a married woman may dispose of her immovable property *inter vivos* with the consent of her husband " but not otherwise"—and a minor is also under a common law disability as regards the disposal of his property. It is a well settled principle of law that a party cannot by representation, any more than by other means, raise against himself an estoppel, so as to create a state of things which he is under a legal disability from creating. On this principle it has been held that a corporate body cannot be estopped from denying that they have entered into a contract which it was *ultra vires* for them to

1. *(1909) 1 Cum. L.R. 224.*

Sinno Appu vs. Podi nona

Lascelles C. J.

make: *Canterbury Corporation v. Cooper* [1]; that a married woman protected by a restraint on anticipation cannot either by deed or representation estop herself from denying facts which if true would put an end to the restraint: *Cannon v. Farmer* [2]; and the same principle is applicable, subject to certain exceptions and equitable considerations, to contracts entered into by minors. In *Wijesooriya v. Ibrahimsa* [3] on which the learned Commissioner relies, the *ratio decidendi* was that the Court would refuse its assistance to a person who was applying to the court to help him to obtain the benefit of his own fraud. The present case is entirely different, for here the plaintiff, on the strength of the mortgagors' misrepresentation as to their status, is asking the court to clothe with legality an instrument which is in itself of no avail in law. This, I think, cannot be done in view of the authorities which I have cited. I would add that though there is evidence that Deonis made an untrue statement as to his age, the evidence of fraud, in the proper sense of the word, is almost entirely wanting, so far as he is concerned.

I set aside the judgment and dismiss the action with costs here and in the conrt below.

Set aside.

Proctor for Appellants—*W. E. Weerasooriya.*

Proctor for Respondent.—*R. A. H. de Vos.*

[*Note.* It would seem that the decision in *Wijesooriya v. Ibrahimsa* [3] is based on a misreading of *Maasdorp Vol. 1, p. 247* *Maasdorp* there deals with two kinds of contracts made by minors (a) contracts to which the tutors or guardians consent is both necessary and sufficient and (b) contracts to which a guardian's consent is necessary but in-sufficient, e. g. contracts alienating or burdening the immovable property of a minor. Contracts of the former kind are merely voidable and are binding on the other party, whenever they are for the benefit of the minor, but the minor himself remaining free. To this rule, says Maasdrop. there are four exceptions, one of which is *when a minor falsely represented himself to be of full age, and has deceived the contracting party by his misrepresentation.* Contracts of the latter kind (b) are absolutely void when not made with the authority of the Court, and *Maasdorp* nowhere says that there is any exception to this rule or that such contracts are binding on the minor. when he has falsely represented himself to be of full age. See also the local decisions: *Gunasekere Hamine v. Don Baron* [4]; *Mustappa Lebbe v Martinus* [5]; *Manuel Naide v. Adrian Hamy* [6]. *Editors.*]

1. *(1909) March to August L. T. 597* 2. *(1849) 3 Exch: Rep: 698*
3. *(1910) 13 N. L. R. 195.* 4. *(1902) N. L. R. 276.*
5. *(1903) 6 N. L. R. 364* 6. *(1909) 12 N.L.R. 259*

IN THE MATTER OF THE JOINT LAST WILL AND TESTAMENT OF SIMON MORIES AND JUSTINA MORIES.

Henry de Costa—*Petitioner-Respondent.*
Lewis Silva et al—*Executors-Appellants.*

No. 960 D. C. Colombo.

Present : **Lascelles C. J. & Wood Renton J.**

27th May 1912.

Courts Ordinance No. 1 of 1889 § 75—Appealable order—Expression of opinion—Order—Judicial settlement of accounts—Time for appealing—Civil Procedure Code § 5 and Chap : LIV.

Where in a judicial settlement of accounts, there was a contest as to whether the executors had sold any of the properties belonging to the estate for less then their real value, and the District Judge expressed his opinion that the properties sold were worth at least double the amount for which they had been sold, but did not specify the exact sum which he considered to be their true value nor make an order directing the executors to bring any particular amount into Court.

Held that this is not an appealable order and that the appeal is premature.

Per Lascelles C. J. After the Judge has made his decree on the petition for a judicial settlement, the appellant will have an opportunity, if he is so advised, of appealing against any of the findings to which he objects.

This was a petition for the judicial settlement of the appellants' accounts as executors. There were nine objections taken in the petition but on the date of trial the parties agreed that one of the objections should be tried first, as to whether the executors had sold certain properties of the testator for less than their real value. The learned District Judge found on the evidence that some of the properties which were sold were worth, at least, double the amount.

Against this finding the executors appealed.

*Walter Pereira K. C., S. G. (*with *Samerewickrame)* for the respondent.—The appeal taken in this case is premature. There is no formal order on record, A mere decision on matters placed before the Court is not an order (see definition of "order" in § 5 Civil Procedure Code). This is a mere expression of opinion which will pave the way for an order in the future.

In the Matter of the Joint Last Will and Testament of Simon Mories and Justina Mories.

Lascelles C. J.

H. J. C. Pereira (with *E. G. P. Jayetileke.*) for the executors-appellant.—The Judge calls it an order. As a matter of fact it is a judgment. If this is allowed to stand, execution can be levied against us at any moment. The Judge finds that we have under-valued the properties and that we have been privies to a fraud. It is submitted that this is a formal order (see *Peris v. Perera* [1] ; *Punchi Appuhamy v. Mudianse* [2]).

Walter Pereira K. C., S.-G. in reply.

Lascelles C. J.—I have no doubt that the appeal in this case is premature. This is a petition for a judicial settlement in which objection is taken to the account filed by the executors on nine grounds. When the petition came on for trial on the 29th May, 1911, it was agreed that one of the issues should be tried on that day, namely. the issue "whether the executors had sold any of the properties "belonging to the estate for less than their real values, if "so, which of them?"

A good deal of evidence was heard and the Judge declared his decision on the 11th January 1912. He there states that one of the executors' own witnesses had valued certain property sold by the executors at Rs. 8801 which properties the executors had sold for Rs. 5500 and the learned District Judge expressed the opinion that the properties sold were worth at least double the amount for which they had been sold : and in the result the judge answered the question raised in the issue in the affirmative. He did not specify the exact sum which he considered to be the true value of the property, and he did not make any order directing the executors to bring any particular amount into Court. It seems clear to me that this is not an appealable order. It amounts to no more than an expression of opinion on one of several issues which for the sake of convenience was heard separately from the others. The inconvenience of allowing an appeal to be taken against

1. *(1906) 10 N.L.R. 41.* 2. *(1907) 2. A. C. R. 159.*

every item of a contested account is obvious. If such proceedings were allowed an inquiry into the accounts of an executor might be rendered impracticable. After the Judge has made his decree on the petition for a judicial settlement the appellant will have an opportunity, if he is so advised, of appealing against any of the findings to which he objects. In my opinion the appeal is premature and must be dismissed with costs.

Wood Renton J.—I am of the same opinion for the same reasons.

Appeal dismissed.

Proctor for Appellants—*E. W. Perera.*

Proctors for Respondents—*Julius and Creasy.*

ARUMUGAM *v* THAMPU

No. 7690 D. C. Jaffna.

Present : **Lascelles C. J. & De Sampayo A. J.**

21st May, 1912.

Decision on one of several issues—when appealable—privy in estate—mortgage subsequent to judgment—mortgagee no party to the action—res inter alios acta

An interlocutory appeal would lie from the decision of an issue on a point which is not a mere incidental matter but goes to the root of the case, especially if such appeal would prevent necessary evidence being shut out and thus obviate a second trial for the reception of such evidence.

A judgment is not conclusive against a person as privy in estate to a party litigant unless it is shown that he derives title under the latter by an act subsequent to the commencement of the action.

A judgment obtained against a mortgagor of land after the mortgage is *res inter alios acta* as to a mortgagee who was not a party to the action.

The facts of the case are fully set out in the judgment of De Sampayo J.

Kanagasabai. for respondent raised a preliminary objection. No appeal lies. There was no decree, no order, nor judgment. § 143 of the Code throws some light upon what is

appealable and what is not. It is only where an issue of law would dispose of a case entirely that an appeal would lie against a refusal to frame that issue. The present appeal which is from the decision of an issue which does not dispose of the case entirely, is premature. The trial of a case would be crippled if appeals were allowed on the decisions of individual issues.

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De Sampayo A.J.

Balasingham for appellant.—The framing of an issue involves a judicial decision and it is appealable—(*Peiris v Perera* [1]), therefore a decision on such an issue is also appealable. The issue that has been decided is one that goes to the root of the case and an appeal lies from it. Had we not appealed now, when the case comes up in appeal finally, if we succeed in the appeal all that this court can do would be to send the case back for the taking of the evidence which has been shnt out on account of the wrong decision of this issue. The present appeal would obviate that inconvenience and prevent the case from being tried piecemeal. [Their Lordships intimated their willingness to hear the appeal on the merits.] The mortgagee is not bound by the decree of the plaintiff against the mortgagors. He was not a party to the mortgage action and his rights accrued before the plaintiff brought his action on the mortgage. The mortgagee's rights against the mortgagor must be determined at the date of the mortgage and those rights cannot be affected by a decree obtained subsequent to the mortgage. Such a decree is *res inter alios acta, Halsbury Vol 13 § 480.* As the action is constituted the mortgagee cannot be said to be a privy in interest of the mortgagor. *Casperz on Estoppel 172.*

Kanagasabai referred to *Ameer Ali* on Evidence, *pp* 136 and 137, and discussed the appeal on the facts.

c. a. v.

De Sampayo A. J.—The facts of the case, so far as they are material to this appeal are these : One Sanmugam

(1) *(1906) 10 N.L.R. 41.*

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who was the admitted owner of the land *otteid* certain shares in 1853 to one Muttupulle, among whose heirs are the 3rd and 4th defendants. In 1907 the plaintiff alleging that he was a son and heir of Sanmugam brought the action C. R. Kayts 8087 against the 3rd and 4th defendants and certain others as heirs of Muttupulle to redeem the mortgage. In that action the fact of the plaintiff being a son of Sanmugam was put in issue. The Court found in favour of the plaintiff on that issue, and in the result gave him judgment. In the meantime the 3rd and 4th defendants had mortgaged to the 1st and 2nd defendants certain shares of the land which they derived from some other parties who are alleged to be the true heirs of Sanmugam.

Subsequently to the decision of the Kayts action, the 1st and 2nd defendants, who were no parties to that action, sued the 3rd and 4th defendants on their mortgage in the action C. R. Jaffna 7391, and obtained judgment, and an order for sale of the mortgaged property under § 201 of the Civil Procedure Code. On the property being advertised for sale by the Fiscal under that order the plaintiff claimed the property but his claim was rejected by the Court as there had been no seizure as in an ordinary case of execution. The property was ultimately sold and purchased by the 1st and 2nd defendants.

The plaintiff brought the present action against the defendants, alleging that "the 3rd and 4th defendants have " no saleable interest to any share of the said land and the " wrongful sale of the said shares affects the plaintiff's right " to the said land " and praying that the 3rd and 4th defendants may be declared not to have any saleable interest in the land and that the sale may be cancelled.

In the plaint the plaintiff set out the circumstances o the above action C. R. Kayts 8087—and pleaded the decree therein as *res judicata* as against the 3rd and 4th defendants. The 1st and 2nd defendants in their answer took upon them, selves to deny, what was not in fact [asserted by plaintiff-

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that the Kayts case was *res judicata* against them. However, an issue was stated at the trial as to whether the decision in that case as to the plaintiff being a son of Sanmugam was binding on the 1st and 2nd defendants, and a further issue, I take it as an alternative issue, was also stated of consent as to whether the plaintiff was a son of Sanmugam. The District Judge heard argument on the preliminary issue of law, and held that in the circumstances above recited the 1st and 2nd defendants were privies of the 3rd and 4th defendants, and were bound by the decree in C. R. Kayts 8087 and so he decided the issue in favour of the plaintiff and fixed the case for trial on the other issues. The 1st and 2nd defendants appealed.

Mr. Kanagasabai for the plaintiff—respondent took the preliminary objection that no appeal lay on the ground that there was no appealable order. We, however, heard counsel on the appeal. So far there was only a decision on one of the issues in the case, but it was an important issue, and the decision thereon practically amounted to a refusal to hear evidence on the alternative issue of fact whether plaintiff was a son of Sanmugam. No doubt interlocutory appeals in the course of a trial, having the effect of suspending the proceedings are generally to be deprecated when the matter of such appeals may well be brought up at the final appeal. But where, as in this case, the point is not a mere incidental matter but goes to the root of the case an interlocutory appeal is convenient, especially if it would prevent necessary evidence being shut out and thus obviate a second trial for the reception of such evidence. In this case the plaintiff's claim turns upon the fact of his being son of Sanmugam, for otherwise he has no right to the land at all. I think we rightly heard the appeal on its merits.

In my opinion the decision appealed from is erroneous. It will be seen that this is not an action *rei vindicatio* where the plaintiff asserts his title against the 1st and 2nd defendants as purchasers at the execution sale, but an action

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where the plaintiff seeks to shew that the 1st and 2nd defendants' mortgagors, the 3rd and 4th defendants, have no title as against him, and on that ground to have the very execution sale set aside. The form of action is rather novel but I say nothing as to that now. But the action being such as it is, it is the 1st and 2nd defendant's position as mortgagees that is attached. They are, therefore, entitled to raise any defence available as at the date of the mortgage. This mortgage was prior in date to the action C. R. Kayts 8087 and to the decree therein in favour of the plaintiff against the 3rd and 4th defendants, and, therefore, the decree to which the 1st and 2nd defendants were no parties cannot affect them, on the principle that a judgment is not conclusive against a person as privy in estate to a party litigant, unless it is shown that he derives title under the latter by an act subsequent to the commencement of the action. A judgment obtained against a mortgagor of land after the mortgage, is *res inter alios acta* as to a mortgagee who was not a party to the action—*Natal Land and Colonization Co. v. Good* [2].

The appeal should, I think, be allowed with costs.

Lascelles C. J.—I entirely agree.

Appeal allowed.

Proctor for appellant— *T. S. Cooke.*

Proctor for Respondent— *K. Kanagasabai.*

(2) *L. R. 2 P. C. 121.*

SAWER v. TRINGHAM.

D. C. Colombo No. 33334.

Present: **Lascelles C. J. & De Sampayo A. J.**

23rd May, 1912.

Breach of promise of marriage—absence of explicitly expressed intention not to fulfil contract—request to be released—improper conduct—indication of intention to break off engagement.

An action for breach of promise of marriage can be maintained in the absence of an explicitly expressed intention not to fulfil the contract, when it is not an essential term in the contract that the marriage should take place on or before a certain day.

A request by the defendant to be released from the engagement coupled with improper conduct on his part, both before and after the said request, may be taken to indicate a clear intention on his part to break off the engagement.

Frost v. Knight [1] and *Hochester v. De La Tour* [2] distinguished.

This is an appeal from the following judgment of the Acting District Judge of Colombo (F. M. de Saram Esq.)

This is an action for damages for breach of promise on the part of the defendant to marry the plaintiff. The plaint avers that in the month of Nov. 1910 the parties agreed to marry one another and that in or about the month of September, 1911, the defendant wrongfully refused to marry the plaintiff—the marriage having been fixed for the 9th November 1911. The defendant admits the agreement to marry but denies that he refused to marry the plaintiff and further says that he was always ready and willing to marry plaintiff.

The parties went to trial on the issues as to whether there was a refusal on the defendant's part to marry the plaintiff, and, if there was, what damages had plaintiff sustained.

It was contended by Mr. VanLangenberg, who appeared for the defendant that there must be a *distinct refusal* on defendant's part to marry the plaintiff and that the letters did not show such an absolute determination on defendant's part to refuse to perform his contract.

Was there such a refusal? If there was no unequivocal and explicit refusal can such be gathered from the defendant's letters, his conduct and the circumstances of the case?

(1) *5 L. R. Ex: 322* (2) *2 E. & B. 678.*

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A promise of marriage is no longer an obligation *in specie*, but its breach founds a claim for damages, and under sub-section 3 of section 21 of the Ordinance No. 19 of 1907 no such damages can be recovered unless such promise of marriage shall have been made in writing.

In *Beling v. Vethecan*[1] the plaintiff and defendant had verbally promised to marry each other and in a letter addressed to the plaintiff the defendant wrote: "I won't tease you till we get married shall we fix the happy day (D. V.) for the 8th April, the day after Easter". It was argued on behalf of the defendant that if the proposal to marry had been made verbally the production of documentary evidence showing that the defendant admitted that a verbal promise had been made would not be sufficient to entitle the plaintiff to bring an action on the original verbal promise to marry, as the Ordinance only provided for the promise itself being made in writing, and does not provide for the case in which there was a verbal promise corroborated by some other material documentary evidence written by the party sought to be bound by the verbal promise—The Supreme Court construed the letter as containing an offer on the part of the defendant in writing to marry the plaintiff naming a day which offer was duly accepted by the Plaintiff.

In *Jayesinghe v. Perera*[2] the plaintiff and defendant had promised to marry each other. At the father's suggestion the defendant undertook to send him a formal written solicitation of the plaintiff's hand. He failed to do this and at her father's request the plaintiff wrote to the defendant asking him to put his promise in writing. The defendant wrote back a letter in which he says he in not agreeable to plaintiff's father's suggestion for the reason that if he trusts the plaintiff she should trust him; if the plaintiff's parents have no faith in his word, he cannot help it; if they do not believe his word, he is not to blame. The defendant endeavoured to prove that this letter had reference to his promise to lend plaintiff's father some money. This was found to be false by the District Judge. The District Judge believed that the letter alluded to the defendant's promise of marriage.

Wendt, J., said. "so read, in connection with the letter to which it was 'an answer, the letter contains an unqualified admission under the hand 'of the defendant of the existence of his promise to marry the plaintiff, "and in my opinion that is all the Ordinance requires."

It will therefore be seen from the cases, that though there was no express promise to marry in the letters themselves yet if such promise could be gathered from all the facts of the case the letters would be a sufficient compliance with the provisions of the Ordinance.

1. (1903) I. A. C. R. 1. 2. (1905) 9 N. L. R. 62.

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If such is the result of the construction of an express provision of the Ordinance, why should not evidence be led *aliunde* to prove a refusal to marry? The law does not require such refusal to be in writing. I hold therefore that there need not be *an express refusal to marry*, but that such refusal can be gathered from the defendant's letters, his conduct and the surrounding circumstances of the case.

As to the facts. The two families—the plaintiff's and defendant's—were known to each other for many years; and the plaintiff and defendant were acquainted with each other from their childhood and called each other by their christian names.

In November, 1910, the defendant who was then in charge of Wigton Estate, Rozelle, (having come there from Arselena Estate, Yatiyantota) and with whom his sister was living, invited the plaintiff to visit Wigton. This invitation was accepted, and it was during that visit that the defendant proposed to and was accepted by the plaintiff. The defendant states that at that time he had a mistress in the house who occupied a couple of rooms in the back of the house, but I do not believe that plaintiff was aware of that fact at the time of her engagement.

Subsequently the defendant wrote to the plaintiff's father asking for his consent to the engagement. Before giving his consent. Mr. Sawer states that he wrote and asked the defendant if he had any associations which he should not have, and that, if he had any such, they should be knocked off. As to to the contents of the letter in reply, the defendant and Mr. Sawer. are not agreed. Mr. Sawer says that the reply he received from defendant was that he had been keeping a woman as his mistress but that he had paid her off and had finished with her for good and all; that he accordingly accepted defendant's word and gave his consent to the engagement, which he would not otherwise have done. The defendant however states that in answer to Mr. Sawer's letter he wrote back saying that he had been keeping a woman for years and that whilst on Arselena Estate he had commenced making arrangements to get rid of her: that he did not write and say that he had got rid of her. I do not think in the circumstances of the case that the defendant would have sent Mr. Sawer a vague reply. It must be remembered that the defendant had just proposed to and had been accepted by the daughter, and I cannot believe that defendant would have sent a reply other than the one Mr. Sawer says he did send, and I accept Mr. Sawer's evidence on the point.

The parents consent having been obtained, the defendant naturally visited his *fiancee* at Colombo at intervals of time.

Between November, 1910, and January, 1911, the woman Rose continued to live in defendant's bungalow on Wigton. After January, 1911, and up to

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nearly the end of June, 1911, the woman was living in a house at Gampola built for her by defendant and used to visit defendant at his bungalow, the defendant sometimes visiting her at her house.

In June, 1911, the wedding day was fixed for the 31st August, 1911, and the defendant then began to look about for a home for his mistress. He wrote to his friend Robert Philpot who was his neighbour while on Arselena Estate the letter P. 11 and asked him whether he knew of anyone wanting a mistress. Mr. Philpot who had seen the woman while defendant was on Arselena Estate offered to take her over and she was accordingly sent to him.

She lived with Mr. Philpot for about three weeks. The woman was with him when defendant wrote the letter P 12 on 26th July, 1911. At that date the plaintiff was ill with an attack of dysentery which subsequently became very serious and at one time her life was despaired of The wedding which had been fixed for the 31st August, 1911, was consequently postponed to the 9th November, 1911.

A change in the feelings of the defendant then manifested itself His love for the woman Rose overcame the love—if it can be called love—for the plaintiff. The defendant went over to his friend Robert Philpot and removed the woman. I can quite understand Mr. Philpot's annoyance, and, that he and the defendant then fell out, is not a matter of much surprise. The defendant relates this incident in his letter to plaintiff of 17th September 1911, P1. He alludes to the rescue of the woman from Mr. Philpot's custody and says that he had a tremendous row with him and left at 9. 30 p.m. without any dinner and after seeing "that the girl was safe on her way to her village"; but, as a matter of fact, he took the woman with him to Gampola and dropped her at the station. Between the date of the alleged rescue and the return of the woman to Mr. Philpot both the defendant and Mr. Philpot appear to have been visiting the woman. The defendant has produced the letters D1 of 10th September 1911, and D 2 of 16th September, 1911, and the telegrams D 3 of 6th September, 1911, and D 4 of 12th September, 1911, written and sent by Mr Philpot to the woman Rose. The letter D 2 is dated 16th September 1911 which was a Saturday, and in it Mr. Philpot says "Be ready to come down to the Estate on Monday morning (i.e. the 18th September) by 6·30. train from Gampola". The defendant was in Gampola on the 16th September 1911, for he says in his letter to plaintiff dated 17th September 1911, P 1 that he had gone to Gampola that day and that he heard that Mr. Philpot was at Gampola and "as he has again been acting behind my " back and endeavouring to cause trouble I am sure that had I met him " we would have had a free fight" Mr Philpot in his telegram to Rose of Tuesday 12th September 1911 informed her that he was arriving on Wed-

nesday evening (13th September) and asked her to meet him. That there was some such arrangement is shown by Rose's letter to Mr. Philpot dated 8th September 1911, P 9 wherein she refers to the coming visit on the 13th September 1911.

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Rose wished to secure another home for herself as defendant was about to get married and as Mr. Philpot was willing to keep the woman Mr. Philpot made arrangements to take her away. Reprisals in the nature of disclosures to either plaintiff or her father must have been threatened by Mr. Philpot, as defendant continued to interfere with his plans, and defendant then thought that the best thing to do was to tell all to plaintiff herself and accordingly he wrote the letter P 1 of 17th September 1911. He refers to a conversation he had with plaintiff, which was on some day in June 1911, when he said that he had "no encumbrances like many planters and others have". He says that he took it for granted that plaintiff understood what he meant. In the letter P 1 he explains his meaning, viz. that he had kept a mistress for several years and that when he made all arrangements to get rid of her on getting engaged to plaintiff Mr. Philpot asked defendant to send the woman to him. He then ıefers ts the rescue of the woman to which I have already alluded. Defendant further says in the letter that it was best that plaintiff should know these things before they got married for unpleasantness would arise between them if those disclosures were made after marriage. There is this significant statement in the letter : "and "what's more I want you to understand that womau has not the slightest "claim on me. I have cut away from her absolutely and for ever and "have provided for her well".

I do not at all appreciate the necessity for writing such a letter as P 1 to the plaintiff if defendant was conducting himself in a proper manner.

In his letter defendant makes two statements which on the facts as disclosed in the evidence before me are false : (1) that he had made arrangements to get rid of the woman on getting engaged to the plaintiff, and (2) that he had cut himself away from the woman and had provided for her well. As a matter of fact he did not get rid of the woman on getting engaged to plaintiff; nor had he provided for the woman, for Mr. VanLangenberg's evidence shows that though an agreement had been drawn up, it was never signed.

The plaintiff on receipt of the letter P 1 answered it by her letter P 2 of 20th September 1911. That letter is a very sensible and trustful letter. She admires his straight-forwardness but somehow she did not think her lover was as other men are. She tells defendant that she did

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not understand at the time of their conversation in June, 1911, what he meant when he used the word "encumbrances". I believe her when she stated in the witness box that she thought the word referred to pecuniary matters. She was subsequently enlightened on the point.

Mr. Philpot in his letter of the 16th September 1911 D 1 told the woman Rose to come to him on Monday morning by the 6.30 o'clock train, that would be the 18th September, 1911. The defendant says that it was two days after he had written the letter P1 of 17th September 1911 that he went to Mr. Philpot's bungalow at Yatiyantota: that he heard that the woman had gone back to Mr. Philpot: that he went to Mr. Philpot's to remove the woman, that the woman did not ask for his assistance but that he went of his own accord. How does this tally with his statement in the letter P 1 that he had "cut away from the woman absolutely and for ever?"

The defendant having heard that the woman had gone to Mr. Philpot on the 18th September, 1911, followed her on the 19th September 1911.

Two visits were paid by defendant (accompanied by Mr. Sutcliffe, a friend) to Mr. Philpot. The first visit was on the 2oth September 1911 on which date nothing appears to have been done; for the two gentlemen returned to Colombo. The second visit was on the 21st September, 1911, when Mr. Sutcliffe accompanied defendant in a motor car. It was before starting on this second visit that defendant wrote plaintiff the letter P 3 of the 21st September, 1911 from the Grand Oriental Hotel. This letter is most important. The defendant dropped the "pet" name of plaintiff and call her Blanche instead of Barney, and he began his letter by saying that in the circumstances it was necessary that he should be formal. "I write to ask you" wrote defendant, "in your own interests as to your future " happiness &c to release me from my engagement to you. My letter the " other day would have partly explained everything, and all I need further " mention is that I have been on Mr. Philpot's tracks since Tuesday " morning. I went up to Yatiyantota by motor, with Mr. Sutcliffe last " afternoon and returned here at 6 this morning. I am going up again " now. You can draw your own conclusions, and it will suffice if I were " to say that Mr. Sutcliffe practically knows all details now......I shall in " all probability leave the Island very shortly".

The defendant says that in this letter he did not refuse to marry the plaintiff, but that he gave her the option of releasing him from the engagement. I cannot construe the letter in that way. The facts which led up to the writting of that letter must also be considered. Why did the defendant follow the woman Rose to Mr. Philpot's bungalow on the 19th

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eptember 1911? The woman went of her own accord and did not appeal to defendant for help. I asked several times during the course of the trial for an explanation from the defendant of his conduct and the explanation given to me is not a truthful one. It was not because the woman had been good and kind to defendant for several years but because defendant wished to have her back again as his mistress. I accept Mr. Philpot's evidence that, before taking the woman away, the defendant said he was quite willing to write a letter "there and then" to the plaintiff breaking off the engagement. This letter P3 coupled with the defendant's conduct both before and after he wrote the letter, indicates to my mind a clear determination on the part of the defendant to break off the engagement, and I hold that the defendant did refuse to marry the plaintiff. The plaintiff treated it as a refusal to marry her for she handed the letter to her father. Corroboration of the refusal if required is shown by the letter of the 18th October, 1911, P 5 a letter dictated by a lawyer but the postscript is the defendant's own idea. His willingness to marry is not a truthful statement, for he threatens her with the risk of "future developments" if she does marry him. The letters P 9 and P 13 are clear indications what the state of mind of the defendant was when he wrote P3.

Mr. Koch referred me to *Roscoe's Nisi Prius Evidence, Volume 1, page 496*, where it is laid down that to prove the breach there must be evidence that a tender has been made by the plaintiff followed by a refusal on the part of the defendant. But it cannot be contended that there must be such evidence where the refusal to marry is first made by the defendant. f defendant's contention is to prevail, after such refusal, the plaintiff must make a tender which must be followed by another refusal on defendants part.

As there was a refusal to marry the next question to decide is whether a cause of action accrued to the plaintiff to institute the action before the expiry of the date fixed for the wedding to wit: the 9th November, 1911?

In *Hochester v. De La Tour* [1] the defendant had agreed to employ the plaintiff as a courier from a date subsequent to the date of the writ, and the alleged breach of agreement was, that, before the day for the commencement of the employment, defendant refused to perform the agreement and discharged plaintiff from performing it and wrongfully wholly put an end to the agreement. It was held that a party to an executory agreement may before the time for executing it break off the agreement either by disabling himself from fulfilling it, or by renouncing the contract; and that an action will lie for such breach before the time for the fulfilment of the agreement. This principle was applied in the case of *Frost v. Knight* [2] which was an action for breach of promise of marriage.

1. *(1853) (2. E & B 679; 118 E. R 92)* 2. *(1872) (26 L, T. 77)*

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In *Frost v. Knight* the defendant promised the plaintiff that he would marry her on the death of the defendant's father. Before the death of his father, the defendant announced his absolute determination never to fulfil the promise. Cockburn C. J. said "It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus* and that upon it the promisee if so minded may at once treat it as a breach of the entire contract and bring his action accordingly. The contract having been thus broken by the promisor and treated as broken by the promisee performance at the appointed time becomes excluded, and the breach by reason of future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore by anticipation be treated as a cause of action and damages be assessed and recovered in respect of it though the time for performance may yet be remote"

On the authority of *Frost v. Knight* I accordingly hold that it was competent for the plaintiff to at once regard the contract as broken in all its obligations and consequences and sue for the breach thereof.

As I have held in plaintiff's favour on the first issue, she is consequently entitled to damages for defendant's breach of his promise to marry. There is no rule by which the assessment of damages can be regulated but various circumstances have been ruled to be admissible in mitigation or in aggravation. The conduct of the defendant must be considered and the way in which he has treated the plaintiff. Though the plaintiff has been saved from an unhappy married life yet as Bowen L. J. said in *Finley v. Chirney* [1] "on which side of the line is to fall an action which is based on the hypothesis of a broken contract yet is attended with some of the special consequences of a personal wrong and in which damages may be given of a vindictive and uncertain kind not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner"

Nathan Volume 1, Section 365, page 205 lays it down in an action for breach of promise to marry that the injured party can recover, in addition to certain other matters, prospective damages for loss of position, wealth, or other advantages. The Roman Dutch Law does not justify my awarding vindictive damages.

Taking all the circumstances of this case into consideration, I award the plaintiff the sum of Rs. 5,000/- as and for damages. The plaintiff will also have her costs of the action.

1. *(1888) 58. L. T. 668,*

A. St. V. Jayewardene (with *F. H. B. Koch*) for the appellant.—The learned District Judge was wrong in holding there was a breach of the promise in as much as there is no evidence on record to show either an express refusal on the part of the appellant to carry out the contract, or an absolute determination to break off the promise. The defendant not having incapacitated himself from marrying and the promise being a general promise, there must evidence of an absolute renunciation to constitute a breach (see *Frost v Knight* [1]; *Hochester v. De La Tour* [2]). [*Lascelles C. J.* The conduct of the appellant has been bad throughout]. That fact does not affect the present question. The appellant's bad conduct would have been a ground for the respondent to break off the engagement but certainly would not entitle her to sue for damages. [*De Sampayo A. J.* Would not the continued intention of the appellant to keep his mistress constitute a breach of promise ?] It is submitted not. A refusal to carry out the contract cannot be inferred from conduct (see *Halsbury's Laws of England Vol : 16 para 504*).

Elliot, for the respondent was not called upon.

c. a. v.

Lascelles C. J.—This is an appeal from a judgment of the District Judge of Colombo condemning the defendant to pay Rs. 5000 as damages for breach of a promise to marry the plaintiff.

The case went to trial on two issues, namely, (1) did defendant in breach of his promise to marry plaintiff refuse to marry plaintiff and (2) If, so, what damages has the plaintiff sustained ? The appeal was confined to the former issue with regard to which it was contended that the learned District Judge was wrong in his finding that the breach by the defendant by his promise to marry the plaintiff was proved. On the appeal the case of *Frost v. Knight* [1] was relied on as authority for the proposition that an action for

1. *5 L. R. Ex 322* 2. *2 E & B. 678.*

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breach of promise cannot be maintained unless the defendant has explicitly expressed his intention not to fulfil the contract and that a refusal to carry out the contract cannot be inferred from the conduct of the defendant. But this case which follows the principle laid down in *Hochester v. De La Tour* [1] dealt with the special case where the promise is to marry at or after a certain time or is conditional, and the alleged breach of the promise takes place before the time had elapsed or the condition had been fulfilled. No such consideration can apply to the present case, for it was not of the essence of the contract that the wedding should take place on the 9th November; that date had been fixed as a matter of convenience but it was not an essential term in the contract that the marriage should take place on or before that date. Here the question whether the defendant has committed a breach of his promise to marry the plaintiff is a simple question of fact which must be decided, apart from any technical considerations, on a survey of the whole of the evidence. The learned District Judge has held that the letter P[3] written by the defendant to the plaintiff on the 21st September, 1911, conpled with the defendant's conduct both before and after he wrote the letter, indicates a clear intention on the part of the defendant to break off the engagement. I entirely agree with the finding of the District Judge and think that any other construction of the letter would be repugnant to good sense. The letter P [3] is as follows:—

"The Grand Orintal Hotel
Colombo, 21st Sept : 1911.

My Dear Blanche,

Excuse formality, but under the circumstances I consider it is necessary. I write to ask you in your own intrests as to your future happiness etc to release me from my engagement to you.

1 2 *E. & B.* 678

My letter the other day would have partly explained every thing, and all I need further mention is, that I have been on Mr. Philpot's tracks since Tuesday morning. I went up to Yatiyantota by motor with Mr. Sutcliffe last afternoon and returned here at 6 this morning. I am going up again now. You can draw your own conclusions and it will suffice if I were to say that Mr Sutcliffe practically knows all details now and I am sure would be glad to tell either Mr. Sawer or self as much as he knows about the affair. Unfortunately he cannot give any details to anyone of the lady members of the family. I am sure that when Mr. Sawer and the other members of your family hear all details they will agree with me that this is my most honourable course and is in both of our interests.

Please write on to Rozelle, I am going up by night mail to night. I shall in all probability leave the Island very shortly.

Yours Affectionately

Harry"

The learned District Judge has disbelieved the defendant's statement by this letter he intended no more than to give the plaintiff the option of releasing him from his engagement if she wished to do so. In this I entirely agree with the learned District Judge. On the 17th September, the defendant wrote to the plaintiff the letter P [1] in which he disclosed to the latter the fact that he had been keeping a native mistress for several years and stated that he had cut himself away from the woman. This latter statement, as well as several other statements in the letter, was quite untrue. On the 20th September the plaintiff replied by an affectionate and trustful letter P [2] in which she, in effect offers to overlook the defendant's past on the understanding that the defendant would completely sever his connection, with his native mistress. Before receiving this letter, the defendant wrote the letter P [3]. At the time when the defendant wrote the letter P [3] he was engaged in a persistent

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endeavour to recover his native mistress from Mr. Philpot and that gentleman has deposed, and the Judge has accepted his evidence, that the defendant had avowed his intention of breaking off his engagement to the plaintiff. If the defendant had meant no more than the offer to release the plaintiff from her engagement, it is incredible that he should not have answered her letter P [2]. I cannot accept the explanation that the defendant had in the meantime received an angry letter from the plaintiff's father. If the defendant had not resolved to break off his engagement with the plaintiff he would not have left this letter unanswered. The letter of the 18th October, written under legal advice after action brought, and expressing the defendant's willingness to marry the plaintiff is no indication of the defendant's attitude when he wrote the letter P [3]. The former letter was written to give colour to the defence which the defendant was advised to set up. The fact that the defendant, at the time of the trial, was still living with his native mistress demonstrates the insincerity of the defence on which he now relies and shows the value which should be attached to the defendant's statement in the letter P [1] that he had cut off the woman absolutely and for ever. That the defendant intended by the letter P [3] to terminate his engagement to the plaintiff is proved beyond all doubt and I place no credence whatsoever on the defendant's statement that the letter was written with any other intention.

I would dismiss the appeal with costs.

Sampayo A. J.—I agree.

Appeal dismissed.

Proctors for appellant—*D. L. and F. De Saram.*

Proctor for respondent—*Arthur Alvis.*

RAMEN CHETTY *v.* SILVA.

No. 26,251, C. R. Colombo.

Present: **Wood Renton J.**

31st May, 1912.

Contracts by a minor—ratification—Roman Dutch Law.

The Roman Dutch Law as to the ratification of a minor's contracts after majority is in force in this Colony.

Contracts which are neither certainly to a minor's prejudice nor necessarily for his benefit are neither void nor absolutely valid but are voidable and capable of confirmation after majority.

Obiter. The mere fact that the minor was living with his father at the time he borrowed the money and the money was to be applied to get his father employment which would add to his ability to maintain the minor would not be sufficient to make the contract a beneficial one within the meaning of the Common Law.

In this case the plaintiff sued the defendant on a promissory note to recover the sum of Rs. 200. The promissory note was made for Rs. 100 in 1905 when the defendant was a minor. In 1909, the defendant who had then become a major paid the plaintiff a sum of Rs. 25. The defendant pleaded that he was a minor at the time of the making of the note and further that the amount had been paid. The following issues were framed; (1) was the defendant a minor at the time of granting the note sued on (2) If so, is the note invalid ? (3) Even if he were a minor has he ratified the obligation by subsequent payment of Rs. 25 on the note ? (4) what sum, if any, is due to the plaintiff? The learned Commissioner held that the defendant was a minor but the note was valid as the money was borrowed for the purpose of securing an employment to the minor's father with whom he was living. He also held that the defendant ratified the contract by his payment of Rs. 25 after he became a major. He accordingly gave judgment for the plaintiff with costs. The defendant appealed.

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H. A. Jayawardene (with *Cooray*) for the appellant.—There is no proof that the minor was benefited by the contract. On the other hand there is direct evidence which has been accepted by the Commissioner to show that the money was borrowed for the exclusive benefit of his father, namely. to secure an employment for the latter. Therefore the note is invalid.. *Welliappa Chetty v. Peris.*[1]

The Roman Dutch Law of ratification cannot be said to have been introduced into Ceylon; otherwise there would be some direct local authority on the point. Counsel relied on *Gunesekera Hamine v. Don Baron* [2].

W. H. Perera for the respondent.—Under the R. D. L. a minor could upon coming of age either espressly or tacitly ratify a contract made during minority. A tacit ratification is presumed from payment made or accepted after attaining majority. (See *Voet 44. 7. 2.* cited in *Maasdorp Vol. III p. 17* and *Voet 26. 8. 4.* cited in *Masdorp Vol. I p. 247.* There is nothing to show that the Roman Dutch Law on the subject is not in force in Ceylon.

H. A. Jayewardene in reply.

c. a. v.

Wood Renton J.—The plaintiff respondent sued the defendant appellant in this action to recover a sum of Rs. 200 on a promissory note. The appellant pleaded that he was a minor at the time of the making of the note. There was no replication by the respondent, but the issues raised two further points, namely whether, assuming the minority at the time of making the note, the note was invalid, and whether the appellant had not ratified the obligation by a subsequent payment of Rs. 25 upon the note. The learned Commissioner of Requests held that minority had been proved, that the loan was beneficial to the appellant, and that, therefore, the note was not invalid, and further that the appellant had ratified it after majority by the subsequent payment above referred to. There is no appeal in this case

1. *(1906) 3 Bal 4.* 2. *(1932) 5 N.L.R. 273.*

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upon the facts. I am doubtful whether, upon the findings of the learned Commissioner of Requests, the loan in respect of which the note was granted could be said to have been for the minor's benefit. The Commissioner of Requests accepts the statement of the appellant that he borrowed the money exclusively for his father's use. If that were so I do not think that the mere fact that the minor was living with his father, and that the money was to be applied to get his father employment, which would add to his ability to maintain the minor would be sufficient to make the contract a beneficial one within the meaning of the common law. It is unnecessary, however, to decide this point, as the appellant also states, and this is much more probable, that he required the money for himself. The loan was, therefore, beneficial and could be ratified. I think that the decision of the Commissioner of Requests on the issue of ratification is clearly right. The witness Ramen Chetty, father in law of Sollamuttu Chetty, the payee on the note, now deceased, proved a payment and a promise of a further payment by the appellant subsequent to his becoming a major, and gave evidence also of a similar payment and promise by the appellant to the deceased payee. The proof of the latter payment and promise consisted of statements made by the payee to his father-in-law Ramen Chetty. Mr. Hector Jayewardene, the appellant's Counsel, argued that evidence of these statements was not admissible even under § 32 (2) of the Evidence Ordinance, in as much as there was nothing to show that they were made "in the ordinary course of "business". The evidence in the record proves, however, Sollamuttu Chetty, the deceased payee, had been in the habit of consulting his father-in-law Ramen Chetty in business matters, that he sent for him to go to India, where he was lying ill, for the express purpose of entrusting him

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with the collection of the appellant's debt and of other debts also, and that Ramen Chetty was attending to his business while he was ill. Under these circumstances, I think that the statements made by Sollamuttu Chetty to Ramen Chetty may fairly be said to have been made in the ordinary course of business.

Mr. Hector Jayewardene also argued that the Roman Dutch Law of ratification of contracts by a minor was not in force in Ceylon. No direct authority was cited to me, nor am I aware of any, in support of this proposition, and all that Mr. Jayewardene could say was that there was no reported case in which that doctrine had been recognised. He referred also to the decision of the Supreme Court in *Gunesekera Hamine v. Don Baron* [1] that a donation by a minor unassisted by a guardian cannot be ratified subsequently when the minor comes of age. The *ratio decidendi* in that case was that a donation cannot possibly be beneficial to the donor and Wendt J. in the course of his judgment quotes a passage from *Thomson* [2] to the effect that contracts which are neither certainly to a minor's prejudice nor necessarily for his benefit are neither void nor absolutely valid, but are voidable and capable of confirmation after majority. In this passage *Thomson* is stating the law of Ceylon,

I see no reason to doubt but that the Roman Dutch Law as to the ratification of a minor's contracts after majority is in force in this colony.

The appeal is dismissed with costs.

Appeal dismissed.

Proctor for appellant—*C. M. Brito.*

Proctor for respondent—*J. G. Fernando.*

(1) (1902) 5 N.L.R. 273. (2) *Institutes, Vol. 2. p. 214.*

SINNETAMBY *v.* TANGAMMA.

No. 390 D. C., Batticaloa.

Present: **Lascelles C. J. & Wood Renton J.**

5th June 1912.

Stamps—petition of appeal—value of whole estate and not appellant's interest—insufficiently stamped - supply of deficiency—time limit.

A petition of appeal ought to be stamped according to the scale applicable to the class to which it belongs and not according to the value of the appellant's interest in the estate.

Where a petition of appeal has been insufficiently stamped the deficiency cannot be supplied after the time limit has expired.

Salgado v. Peiris [1] followed.

This is a testamentary case. The petitioner-appellant who was entitled to $\frac{1}{12}$ share of the estate applied to the Court for an order on the administratix-respondent directing her to assign the appellant's $\frac{1}{12}$ share to him. After inquiry the learned District Judge disallowed the application and the petitioner appealed. His petition of appeal was stamped on the value of $\frac{1}{12}$ share of the estate.

Bartholomeusz for the respondent, took the preliminary objection that the petition of appeal was not sufficiently stamped. The Schedule in part 3 of the stamp ordinance regulates stamp duties in testamentary proceedings. According to that schedule a petition of appeal onght to be stamped according to the scale of the class to which the proceedings belong.

The appellant cannot be allowed to remedy the defect after the time limit has expired. *Salgado v. Peiris* [1].

J. Joseph for the appellant.—The appellant is interested in only $\frac{1}{12}$ of the estate and the matter in dispute is only $\frac{1}{12}$ of the estate and the appeal is therefore sufficiently stamped. If the Court holds that the appeal is insufficiently stamped the appellant may be allowed to supply the deficiency under § 87 of the Stamp Ordinance.

Lascelles, C. J.—There can be no doubt from the letter of the petitioner's Proctor which has been forwarded to us by the District Judge that the petition of appeal has

1. (1909) 12 N.L.R. 379.

Sinnetamby v. Tangamma

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been insufficiently stamped. According to the schedule in part 3 of the Stamp Ordinance, a petition of appeal ought to be stamped according to the scale applicable to the class to which it belongs. Here, the petition of appeal has not been stamped on the value of the estate, but on the value of the 1/12 interests of the appellant in the estate. It is not seriously contended, and it cannot be contended that the petition of appeal is properly stamped. Then the only question which remains is whether the appellant is to be allowed to supply the deficiency now. On that point we are bound by the judgment of the Full Court in *Salgado v. Peiris* [1]. There it was held that the proper stamping of a petition of appeal within the appealable time, was a condition precedent to its acceptance under the Civil Procedure Code. This decision, with which I entirely agree, is applicable to the present case, and is fatal to the present appeal. Counsel for the appellant has referred to § 87 of the Stamp Ordinance, but I am of opinion that this section has no application to the present case. That section deals with a case where instruments in a testamentary suit are unstamped owing to the estate being undervalued, or from other similar causes. Then it is the duty of the Secretary of the District Court, on the first Monday of every quarter, to prepare a statement showing the deficiency of stamp duty, and the Judge there requires the party who tendered the instrument to make good the deficiency. This section has obviously no bearing on the condition subject to which a petition of appeal can be accepted. One of those conditions is that the petition of appeal must be duly stamped within the appealable time. I am therefore, of opinion that no proper petition of appeal has been presented as required by the Civil Procedure Code, and that the appeal, therefore, fails and must be dismissed with costs.

Wood Renton, J.—I agree.

Appeal dismissed.

Proctor for appellant—*T. A. Sethukaveler.*

Proctor for respondent—*J. Kadramatamby.*

1. *(1909) 12 N. L. R. 379.*

ABDUL HASSEN HADJIAR v. LEVANA MARIKAR.

No. 10347 D. C. Galle.

Present: **Lascelles C. J. & Wood Renton, J.**

18th June 1912.

Civil Procedure Code § 547—transfer of property over one thousand rupees—probate or administration not taken out—penal provision—protection of revenue—power of Court to stay proceedings till plaintiff obtains letters of administration.

§ 547 of the Code while it penalises does not prohibit the transfer of property which ought to have been but which has not been administered and such a transfer is not necessarily invalid.

The penalties imposed by that section are exhaustive, and the principal and the only object of the penalty is the protection of the revenue.

The District Court has power to stay proceedings and allow an opportunity to the plaintiff to take out letters of administration before the action is further proceeded with.

Gooneratne v. Hamine [1] followed.

The facts of the case are given as follows in the judgment of Lascelles C. J. :

This is a partition action in which the plaintiff claimed in addition to another share with regard to which no question arises on this appeal one-sixth of certain house property in Galle by virtue of a conveyance dated the 2nd August, 1902, by which Natchia Umma and Mohammed who are stated to be the widow and only child of one Abdul Aziz purported to convey the interest of Abdul Aziz to the plaintiff. The appellant intervened and by his answer averred that the estate of Abdul Aziz was over Rs. 1000 in value and that the conveyance from his widow and child to the plaintiff was invalid under § 547 of the Civil Procedure Code as administration had not been taken out. It was conceded that the estate of Abdul Aziz exceeded Rs. 1000 in value. In the decision from which the appeal is taken the learned

1. *(1903) 7 N. L. R. 299.*

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District held (1) that the plaintiff's claim in this particular action was not an action "for the recovery of land" within the meaning of § 547 of the Civil Procedure Code and (2) that in view of any doubt which might exist as to the validity of the conveyance on which the plaintiff claimed the plaintiff should be allowed on opportunity of obtaining administration. The intervenient appealed.

H. A. Jayewardene (*A. St. V. Jayewardene* with him) for the appellant.—The effect of § 547 is to invalidate a transfer executed without obtaining letters of administration. The legislature impliedly prohibited such transfers by declaring that the transferor and transferee shall be guilty of an offence and liable to a penalty of Rs. 1000. No action can be maintained in respect of anything that the legislature has expressly or impliedly prohibited [*Lascelles C. J.* Is not the penalty in § 547 enacted for the purpose of revenue only?] It is enacted for the protection of the revenue as well as for the protection of the public in order to prevent persons passing off bad titles. But whatever the object may be, if there is a prohibition, the law will not help any person to enforce the prohibited contract. Counsel cited *Guy v. Felton* [1] *Cope v. Rowlands* [2] *Victorian Daylesford v. Dott* [3] *Peiris v. Fernando* [4] and *93 D. C. Kandy 21155* [5].

The order of the District Judge allowing administration to be taken out after the institution of the action is wrong. The section says that no action shall be maintainable without administration and the action was bad at its inception. The court has no power to make an order which would have a retrospective effect.

The rights of the parties must be determined as at the date of the action. *Silva v. Nonahamine* [6], *Ponnamma v. Arumugam* [7]. The latter case is also an authority for the propo-

1. (1813) 4 Taimton 881.
2. (1836) 2 M & W. 149.
3. (1905) 2 Ch. 624.
4. (1904) 1 Bal 199.
5. S. C. Min. 11th June 1912.
6. (1906) 10 N. L. R. 44.
7. (1905) 8 N. L. R. 223.

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sition that an objection based on want of administration is not merely a technical or fiscal objection, and that a partition suit is in substance an action for the recovery of immovable property [*Lascelles C. J.* The practice has been to stay proceedings and order administration to be taken out.] This course has undoubtedly been taken in several cases but in those cases no objection was taken by the opposite party to the indulgence being granted.

Bawa K.C. for the respondent.—The terms of § 547 clearly show that the penalty was enacted for the protection of the revenue. The section empowers the Court to recover the stamp duty where transfer has been executed in violation of that section. This section was enacted for the protection of the public as the full court has held that on the death of a person his property vests immediately in the heirs and that they require no transfer from the administrator to pass title. The effect of a provision such as is contained in § 547 was fully discussed in *93 D. C. Kandy 21155* [1]. See also *Meliss v. Shirley Local Board* [2]

As regards the power of the Court to stay proceedings and allow administration to be obtained such power has been exercised in many cases *Gooneratne v. Hamine* [3]. The word "maintainable'' means continuing what has already been instituted and the Court has power before allowing an action to continue to require that administration should be obtained.

H. A. Jayewardene in reply.

c. a. v.

Lascelles C. J.—In the appeal the legal questions involved were very fully discussed but there are practically only two questions for decision, namely, (1) whether the effect of § 547 is to invalidate transfers of property where administration has not been taken out and (2) whether the learned

1. *S.C. Min. 11th June 1912.* 2. *(1885) 16 Q.B.D. 446.*
3. *(1903) 7 N.L.R. 299.*

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District Judge was right in allowing the plaintiff an opportunity of obtaining administration so as to get rid of the objection that the action was not maintainable.

Lascelles C. J.

With regard to the first question it was contended that it must be inferred that the transfer was invalid from the fact that the section declares that the transferor and transferee, in a case where property is transferred without administration having been taken out are guilty of an offence and provides for their punishment. In a recent case where an analogous question came before this court (1), I cited the judgment of Lord Esher in *Meliss v. The Shirley and Free mantle Local Board of Health* [1] as a clear and practical exposition of the principle of construction which should be followed in such cases. Applying this test, it is clear that the principal and as far as I can see, the only object of the penalty is the protection of the revenue. The heavy penalty which the section imposes (a fine which may extend to Rs. 1000.) justifies the inference that the legislature considered that the punishment provided in the section would be sufficient to enforce compliance with the law without the addition of a further penalty in the shape of the invalidation of the transfer, which in some cases would be a punishment of extreme severity. Then there is the provision enabling the Crown to recover from the transferor and transferee the amount of the stamp duty payable on administration. This, I think, to some extent is an admission of the validity of the transfer, for if the transfer were invalid why should the transferee who would have no interest in the estate be held responsible for administration duty?

Looking at the section as a whole I am of opinion that the penalties imposed by the section are exhaustive, and that the Legislature deliberately refrained from invalidating the transfer. It is not for us to speculate on the reasons which determined the Legislature to take this course. But there

1. *16 Q.B.D. 446.*

are, at least, two circumstances which can hardly have escaped consideration. The invalidation of the transfer in these cases would be a punishment of extreme severity: in many cases as where it was honestly believed the property was under Rs. 1000 it would amount to grave injustice. But the punishment would be unfair in its incidence. It would penalise the transferee, but as regards the transferor or his heirs it would have the effect of restoring the property to him or them. Further the invalidation of the transfer would lead to wide spread confusion and uncertainty in the titles to landed property, for the cases in which administration is not taken out are very numerous indeed. For these reasons I am of opinion that it cannot be deduced from the language of § 547 that the transfers penalised by the section are necessarily invalid.

The second point, namely, the question whether the Judge was right in allowing the plaintiff the opportunity of obtaining administration is covered by authority. In *Gooneratne v. Hamine* [1] Layard C. J. in an action for declaration of title, held that in the extent of the estate being proved to be of the value of Rs. 1000 administration must be taken out before the plaintiff could be allowed to proceed with the action. This decision involves the construction that the words "no action shall be maintainable" are not equivalent to "no action shall be instituted" and disposes of the argument which has been addressed to us on the point. We have been invited to reconsider this decision. But from the fact that the judgment is binding on us I see no reason for doing so. The decision has been repeatedly followed and is now settled law.

It is not necessary to consider whether this is an action for the recovery of land within the meaning of the section, as the question at this stage is purely academic and will not arise if the plaintiff makes use of the opportunity given him

1. (1903) 7 N.L. R. 303.

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by the District Judge of obtaining administration. I would dismiss the appeal with costs.

Wood Renton J.

Wood Renton J.—The plaintiff respondent sues in this action for a partition of the property described in the plaint, relying for his title on a deed of transfer from the heirs of one Abdul Aziz dated 2nd August 1902. The 4th defendant, the appellant, intervened, claiming a house standing on the premises in question, and objected that the respondent's action was not maintainable, in as much as the estate of the predecessor in title of the respondent's vendor, Abdul Aziz, exceeded Rs. 1000 in value and had not been administered. The learned District Judge held in effect that the action could still be maintained and the deed of transfer set up, if administration was taken out now, and he adjourned the trial for the purpose of enabling the respondent to obtain letters of administration. The present appeal is brought against the order enabling the respondent to comply with the requirements of § 547 of the Civil Procedure Code. The respondent's Counsel objected that it was not appealable, but we overruled this objection and heard Mr. Hector Jayewardene on the appellant's behalf. Two points were urged in support of the appeal, first that the estate of Abdul Aziz not having been administered, the deed of transfer by the heirs in the respondent's favour was invalid, and, in the next place, that, in any event, § 547 of the Civil Procedure Code expressly prohibited such an action as the present from being maintained. In my opinion, both points are bad. § 547 of the Code does not prohibit the transfer of property which ought have been, but has not been, administered. It penalises such a transfer, but the language in which the penalty is imposed as well as that of the section as a whole point, in my opinion, to the conclusion that the Legislature did not intend to do anything more than this. The words "in the event of any such property being transferred......... "every transferor and transferee of such property shall be 'guilty of an offence", themselves indicate the possibility of

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a legal transfer taking place. The subsequent provision empowering the Crown to recover from "such transferor or "transferee such a sum as would have been payable to "defray the costs of the stamps necessary for letters of "administration" corroborate this view. They seem to treat transfers of the character in question as valid transactions in respect of which stamp duty may properly be recovered. Mr. Jayewardene argued that the provision that the transferor or transferee of property requiring administration, but unadministered, "shall be guilty of an offence" showed an intention on the part of the Legislature to make the transfer itself illegal. But these words are common form in enactments of this description, and do not of themselves justify the inference which Mr. Jayewardene sought to draw from them. There is no need to repeat what we have recently said in *93 D.C. Kandy No. 21155* [1] as to the law applicable to the question with which we are here concerned In addition to the authorities there cited, I would refer to the case of *Victorian Daylesford v. Doff* [2]. In my opinion § 547 while it penalises, does not prohibit, the transfer of property which ought to have been, but has not been, administered. Such an enactment at the time when the Code of Civil Procedure passed would have unsettled the titles to very numerous properties, and I think that the Legislatnre must be taken to have deliberately abstained from declaring the law in this sense.

With regard to Mr. Jayewardene's second point, I think that it may fairly be argued that the words in § 547 of the Civil Procedure Code "no action shall be maintainable" mean only 'shall be capable of being proceeded with'. This view of the law has the implied sanction of the decision of Layard C. J. and Wendt J. in *Gooneratne v. Hamine* [3] where the point was taken in the appellant's argument, and where both the learned Judges held that while § 547 of the Code is impera-

1. *S. C. Minutes 11th June 1912.* 2. *(1905) 2 Ch. 624.*
3. *(1903) 7 N.L.R. 299.*

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tive, it was open to the Court to give the party seeing an opportunity of taking out the necessary administration. That decision has, to my knowledge, been repeatedly followed in the courts of Ceylon, and I think that the rule which it sanctions is an extremely salutory one. The primary object of § 547 is to protect the revenue. That object is obviously secured by the refusal of the courts to allow an action for the recovery of property liable to administration, but not administered, to proceed until a grant of administration has been obtained. We ought not to place upon § 547 an interpretation, which its language does not compel us to adopt, and which, as in the present case, can only serve to support purely technical objections. It appears to me, moreover, that the present action is not one for the "recovery" of property within the meaning of § 547. I do not understand the Privy Council in the case of *Ponnamma v. Arumogam* [1] to have held that every partition action comes within the scope of these words. On the contrary, the Privy Council pointed out in that case that the action was one for partition only in form, that a considerable portion of the property had already been dealt with by the heirs and alienated, and that consequently it was in reality an action for "the recovery" of property. The present appeal possesses no merits, and I am very glad that I have been able to come to the conclusion that it ought to be dismissed with costs.

Appeal dismissed.

1. *(1905) 2 N L.R. 223.*

PERERA v. PERIS.

No. 24,247 C. R. Colombo.

Present: **Lascelles C. J.**

31st May 1912.

Lease—planting agreement—action for cancellation—conduct of lessee or planter evincing intention no longer to be bound by agreement—abuse of property leased—destruction by fire of trees attributable to malicious action or negligence on part of lessee or planter—damage not trivial.

The cancellation of a lease or planting agreement may be demanded before the expiry of the term of the agreement if the conduct of the lessee evinces an intention no longer to be bound by the contract or if the lessee has abused the property leased to him, *in re conducta male versatur.*

The destruction by fire of trees, resulting in damage not of a trivial nature or such as might easily be repaired whether attributable to malicious action or mere negligence on the part of the lessee is such an abuse of the thing leased as the Roman-Dutch Law contemplates as a ground for the rescission of the lease.

This is an action for the cancellation of a lease or planting agreement and for damages on the grounds that the lessees had failed to plant the land in terms of the agreement, had misappropriated some cocoanut plants which had been supplied by the lessor for the purposes of planting, and that one of the lessees, viz. the 1st defendant, had maliciously damaged by fire a number of cocoanut trees. The 1st defendant and the assignees of a portion of his interest alone contested the action. They denied the above allegations and contended that the action was premature. The Commissioner of Requests entered judgment in favour of the plaintiff in terms of her prayer.

The defendants appealed.

Bawa K. C. for the appellants.—The defendants' objection that the action was premature should have been upheld. An action to recover damages for the breach of a covenant cannot be maintained until after the expiration of the lease

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(see *de Fonseka v Fernando*[1]). The penalty of forfeiture is not provided for in the terms of the contract. While the contract provides that breaches of certain covenants would be visited with penalties, it is silent on the question of forfeiture.

E. W. Jayewardene for the respondent.—The destruction by fire of a number of valuable cocoanut trees is evidence of a notably grave and damifying misuse of the property leased on the part of the lessees which would entitle the lessor to a cancellation of the lease (see *Perera v. Thaliff*[2]). The conduct of the lessees in not planting the land and in misappropriating the plants supplied by the lessor amounts to a repudiation of the contract. The lessee had no authority to assign his duties to another. This being a personal contract the 1st defendant had no right to assign the burden of his obligation without the consent of the lessor. (*Voet. 19-2-16 Berwick pp. 212 & 218*; 7 *Halsbury 438* ; *General Bill Posting Co. Ltd. v. Atkinton*[3]).

Bawa K. C. in reply. There in no evidence of an actual repudiation of the contract. A mere delegation of duties cannot be construed to be a repudiation.

c. a. v.

Lascelles C. J.—In this case the plaintiff has sued for and recovered judgment ordering the cancellation of a lease or planting agreement between the plaintiff of the one part and the defendant of the other part and also ordering the 1st defendant to pay Rs. 14/- as damages for the failure of the 1st defendant to plant 290 cocoanut plants supplied to him by the plaintiff in accordance with the agreement and also Rs. 110/- for damages caused by the 1st defendant by destroying the cocoanut trees of the first plantation. From this judgment the 1st defendant now appeals on the ground

1. *1 S. C. R. 55.* 2. *(1904) 8 N. L. R. 118*

3. *(1909) A. C. 118.*

that the action is premature, being brought before the expiry of the term of the agreement and when over 6 years of the term of 9 years granted by the agreement is still to run. In my opinion the judgment is justified on either of the two following grounds. In the first place the conduct of the plaintiff is inconsistent with an intention to be bound by the agreement and to carry out its terms. The learned Commissioner has found and I entirely agree with his finding that the plaintiff duly supplied the defendants in pursuance of the agreement with 290 cocoanut plants. The 1st defendant not only denies the receipt of these plants but puts forward the alleged failure of the plaintiff to supply them as an excuse for his failure to plant the land in accordance with the agreement. Further, from the evidence of the 1st defendant it is plain that he has no intention of honestly carrying out the agreement. The 1st defendant has thus by his acts and conduct evinced an intention no longer to be bound by the contract. In these circumstances the plaintiff is justified in demanding the cancellation of the contract. *General Bill Posting Co. v. Atkinton* [1] The other ground on which I am of opinion that the judgment is sound is to be found in the principle of the Roman-Dutch law that although the *conductor* cannot ordinarily be ejected from the property which he has taken on lease before the expiry of the appointed term, this is permitted when the *conductor* has abused the thing hired to him *in reconducta male versetur* (*Berwick's Voet p. 212.*)

In the present case the learned Commissioner had found that the defendants are responsible for the destruction by fire of the greater part of the trees of the old plantation. Now whether the destruction of these trees is attributable to malicious action on the part of the 1st defendant as, there is reason to suspect, or whether it is due merely to negligence on his part it is clear that the defen-

1 (1909) *2 Appeal Cases p. 118.*

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dant, under the rule of the Roman-Dutch law which I have cited, is liable to be ejected. The damage caused is not of a trivial nature or such as might easily be repaired. The destruction of these trees must inevitably detract from the value of the property at the termination of the lease. The conduct of the defendant in allowing the property to be so injured is clearly such an abuse of the position of the lessee as the Roman-Dutch law contemplates as a ground for the rescission of the lease. In the view which I take of the legal effect of the 1st defendant's conduct it is unnecessary to consider how far the defendants were justified in assigning to others a share of the planting agreement or lease. In my opinion the judgment of the Commissioner is justified on the grounds which I have stated and I dismiss the appeal with costs.

Appeal dismissed.

Proctors for appellants—*G. L. Cooray* and *G. E. G. Weeresinghe*

Proctor for respondent—*O. A. Jayesekere.*

HUDSON *v.* PONNIAH KANGANY.

No. 5078 P. C. Badulla Haldummulla.

Present: **Pereira, J.**

9th July 1912.

Master and Servant—sub-kangany—refusal to work as a cooly—Ordinance No. 11 of 1865 § 11.

A sub-kangany who refuses to work as a cooly when ordered to do so in the ordinary course of employment or not, is liable under § 11 of Ordinance No. 11 of 1865.

The fact that the order to work as a cooly was not given in the ordinary course of estate management but as a punishment may well be taken into consideration in mitigation of the offence.

Natu Meya v. Kadersa 1 followed.

In this case, the accused Ponniah was a sub-kangany working on Glenanore Estate, Haputale. As a punishment for certain alleged acts of misconduct, his employer Mr. Hudson stopped his supervising work as a kangany, and ordered him to work as a cooly in the field. He refused to do so. He was thereupon charged under § 11 of Ordinance 11 of 1865 with refusing to work and with absenting himself from work without leave or reasonable cause and, after trial on the 21st June 1912, was convicted and sentenced to undergo one month's rigorous imprisonment and to pay a fine of Rs. 25, or in default to undergo a further term of imprisonment for one month. The accused appealed.

L. H. de Alwis, for the accused-appellant.—In this case as in *MacLean v. Appan Kangany* 2, the order to work as a cooly was not given in the ordinary course of estate management, but as a punishment for certain alleged acts of misconduct. There is no criminal intent proved against the accused viz. that his disobedience was wilful and not due to an erroneous idea of his rights and duties. The

1. *P. C. Badulla 11091, S.C.M. 7th September, 1902*
2. *(1899) 2 N.L.R. 54.*

Hudson v. Ponniah Kangany

Pereira J.

accused believed that it was no part of his duty to perform manual labour. During the 5 or 6 years he worked on the estate he had never before worked as a cooly. This would indicate that his contract of service with the estate did not extend to his doing manual work. The decision in *MacLean v. Appan Kangany* [1] was followed in a later case by Middleton J. in *Ryan v. Weerappen* [2] Counsel also cited :—*P. C. Matale 21,198, S. C. M. 8th September 1881.*

Wadsworth, for the complainant respondent.—The decision in *MacLean v. Appan Kangany*[1] would not apply to this case. There is evidence to show the order was given in the ordinary course of estate management. This case would more nearly be governed by the decision of Wendt. J. in *Nalu Meya v. Kadersa* [3], where it was held that a sub-kangany may be ordered, in the absence of exempting custom, to work as a cooly, at any time. Here there is evidence that nearly all sub-kanganies work as coolies, and is usual for them to do so."

c. a. v.

Pereira, J.—The accused is charged under § 11 of Ordinance No. 11 of 1865 with refusing to work and absenting himself from work without leave or reasonable cause. He is a sub-kangany in Glenanore Estate and his defence is that he was asked to work as a cooly and that being on the estate as a sub-kangany, he refused to work as a cooly. The question of the liability of a kangany to work as a cooly has been considered by this Court in several cases. It is sufficient to refer here to only three of them. In *MacLean v. Appan Kangany*, [1] Bonser, C. J., held that a tea estate kangany, who refused to obey an order to perform manual labour in the reasonable belief founded on the previous course of business on the estate that it was no part of his duty to perform such labour, was not guilty of wilful disobedience under § 11 of the Ordinance. That case was followed by

1 *(1899) 2 N.L.R. 54.*
2 *P. C. Matale 26860 S.C.M 12th October 1906.*
3. *P. C. Badulla 11091 S.C.M. 7th September 1902.*

Hudson v. Ponniah Kangany

Pereira

Mr. Justice Middleton in the case of *Ryan v. Weerappen*[1] The present case, however, is more in line with that of *Natu Meya v. Kadersa Kangany*[2]. Here Wendt, J. observed :— "There is no evidence to show that an agricultural labourer merely because he is a sub-kangany, is entitled to choose whether he shall himself work or not. It is not suggested that it is a generally recognised custom in such employment that a sub-kangany shall not be obliged to work with his own hands." These observations apply with equal force to the present case and moreover, here there is positive evidence to the effect that "nearly all sub-kanganies work as coolies and it is usual for them to do so." But as in the case of *MacLean v. Appan*,[3] it is clear that in the present case the order to work as a cooly was not given in the ordinary course of estate management, but as a punishment for certain acts of misconduct by the accused, which had been reported to Mr. Hudson. In *MacLean v. Appan*[3] the fact that the order was not one given in the ordinary course of estate management, but was an exceptional order given to assert the authority of the Superintendent went a great way towards contributing to the grounds on which the acquittal was based. The similar incident in the present case may not altogether exonerate the accused, but it may well be taken into consideration in mitigation of his offence. The reasons given by Wendt, J., in *Natu Meya v. Kadersa*[2] for reducing the sentence apply with equal force to this case. I affirm the conviction but reduce the sentence to a fine of Rs. 25, or in default of payment of the fine to one months' rigorous imprisonment.

Conviction affirmed; sentence reduced.

Proctor for appellant—*A. C. W. Samarakoon.*
Proctor for respondent—*R. E. Blaze.*

1. *P. C. Matale 20860, S. C. M. 12th October 1906.*
2. *P. C. Badulla 11091 S.C.M. 7th September 1902.*
3. *(1902) 2 N L.R. 54.*

KURERA *v.* TAMEL.

No. 4531 D. C. Chilaw.

Present : **Lascelles C. J. & Wood Renton J.**

15th July 1912.

Res judicata—action by purchaser at a Fiscal's sale without obtaining Fiscal's conveyance—dismissal of the action—subsequent action after obtaining Fiscal's conveyance—§§ 207 & 289 Civil Procedure Code.

Where an action brought by a purchaser at a Fiscal's sale who had not obtained the Fiscal's transfer was dismissed, such dismissal is no bar to a subsequent action brought after obtaining the Fiscal's conveyance.

Under § 289 of the Code the judgment-debtor is not divested of title until the execution of the Fiscal's conveyance and therefore it follows that at the date of the former action the title set up in the latter namely. the title based on a Fiscal's conveyance not only was not, but could not have been set up.

The plaintiff appellant in this case was the purchaser of certain shares of land, the subject matter of the present action, at a Fiscal's sale in 1879. He thereafter entered into the premises and remained in possession of the same till 1906 when he was ousted by the respondents. Therefore without obtaining a Fiscal's transfer he brought the action No. 12371 of the Court of Requests of Chilaw for declaration of title against the respondents. The action was dismissed in view of certain judgments of the Supreme Court which held that until the Fiscal executed a conveyance no title vested in the execution purchaser, and as the plaintiff failed to establish the alternative title by prescription, independent of the purchase which he set up. Subsequently the appellant obtained a Fiscal's conveyance dated 23rd November 1910 and instituted this action. The learned District Judge held that the decree in C. R. Chilaw 12371 was *res judicata* and dismissed the action. The plaintiff appealed.

H. A. Jayewardene for the appellant.—The present action is based on a new title and the judgment in the previous case does not operate as *res judicata*. Although in the former case

Kurera v. Tamel

Lascelles C. J.

also the plaintiff claimed by virtue of a fiscal's sale he had no fiscal's conveyance and the title at that date was in the judgment-debtor. § 207 Civil Procedure Code only bars every right that could have been put forward in the previous case and not any title or right subsequently acquired. The plaintiff's present title was not then in existence and could not have been set up. Although the plaintiff alleged a purchase at a fiscal's sale he had no title arising from such purchase. It has been held that where a plaintiff claims title by virtue of a fiscal's sale and has no transfer at the date of action, but obtains one during its pendency he is not entitled to rely on it at the trial. He cited *Hukm Chand's Res Judicata p 136*; *Caspersz p. 95*; *Ibrahim Baay v. Abdul Rahim* [1]; *Kameswar Perstad v. Pajkumari Puttan Koer* [2]; *Silva v. Nona Hamine* [3]; *Silva v. Hendrick Appu* [4]; *Karunawardene v. Wijeyesuriya* [5].

No appearance for respondent.

c. a. v.

Lascelles, C. J.—A simple question of law is raised by the present appeal. The plaintiff-appellant purchased the share in question at a Fiscal's sale in 1879. He alleges that he entered into and remained in possession until he was ousted by the defendants-respondents. Then, without having obtained a Fiscal's transfer the plaintiff-appellant instituted Court of Requests action No. 12371 which action was naturally dismissed. Subsequently the plaintiff-appellant, having obtained a Fiscal's transfer, instituted the present action in which he claims a declaration of title to the same land. The learned District Judge has dismissed this action on the ground that it is *res adjudicata* by reason of the decree in the action in the Court of Requests. The question for

1. *(1909) 12 N.L.R. 177.* 2. *I.L.R. 20 Calcutta 79*
3. *(1907) 10 N.L.R. 44.* 4. *(1895) 1 N.L.R. 18.*
5. *(1908) 11 N.L.R. 221.*

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Lascelles C.J.

determination is whether the District Judge was right in holding the present action to be *res adjudicata*. However much one may regret the re-opening of this litigation, I am of opinion that in point of law the judgment cannot be sustained. Where immovable property is sold in execution, the purchaser obtains no title until a Fiscal's conveyance in his favour has been made (§ 289 Civil Procedure Code.) In *Silva v. Nona Hamine* [1] it was held with regard to a title claimed on a Fiscal's sale, that the title could not be maintained when a Fiscal's conveyance had not been obtained at the institution of the action, although the sale was confirmed and a conveyance executed shortly after action brought (*vide* also *Silva v. Hendrick Appu* [2] *Karunawardene v. Wijesuriya* [3].) It follows from § 289 of the Civil Procedure Code and from these decisions that, at the date of the action in the Court of Requests, the title now set up namely, the title based on a Fiscal's conveyance, not only was not, but could not have been set up. There was, therefore, no adjudication on the title on which the plaintiff-appellant now claims.

I would set aside the judgment of the District Judge and remit the case for trial in due course of law. In the circumstances, I think, that the plaintiff-appellant is entitled to his costs of the appeal, but the costs of the Court below should abide the result of the action.

Wood Renton, J.—I agree. I would gladly, if I could have distinguished the cases referred to by my Lord, the Chief Justice. But they appear to me to be decisive.

Proctor for appellant—*C. E. Corea.*

Proctor for respondent—*Neg. A. Dharmaratne.*

1. *(1907) 10 N.L.R. 44.* 2. *(1895) 1 N.L.R. 13.* 3. *(1908) 11 N.L.R. 221.*

MANIS APPUHAMY v. NONA, et al

No. 10,259 C. R. Panadura.

Present: **Pereira J.**

17th July, 1912.

New contention—not involved in the issues—when admissible in Court of Appeal—Tasmania case—whatever not involved in issues amount to admissions—Crown grant in favour of deceased person—void.

Under our procedure it is not open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the Court below under some one or other of the issues framed.

When a ground that might have been put forward in the Court below is put forward in the Court of Appeal for the first time the cautions indicated in the case of the "*Tasmania*"[1] may well be observed.

Whatever is not involved in the issues is to be taken as admitted by the one party or the other

Semble, a Crown grant in favour of a deceased person is void.

H. A. Jayewardene for the appellants.

A. St. V. Jayewardene for the respondents.

Pereira J.—In this case the plaintiff derives title to the share of land in dispute from one Juanis in whose favour Crown grant No. 42552 in respect of the whole land appears to have been issued on the 10th August, 1906. It is argued in appeal that it appears from the evidence recorded in the case that Juanis was dead at the date of the issue of the Crown grant, and that, therefore, the Crown grant was void and inoperative being practically in favour of a deceased person. Following the analogy of the effect of a Fiscal's conveyance made in favour of a purchaser after his death (See *Bastian v. Andris*[2]) I am inclined to think that this contention is sound, but is it open to the defendant in this case to raise this question in this appeal? There was no issue either framed or suggested at any time as to whether Juanis was dead at the date of the Crown grant and as to the effect of a grant issued in favour of a person after his death; and in the Court below there was no such contention as is now put forward. Mr. H. A. Jayewardene invited my attention to issue No. 4—"Did Juanis or Singho Appu pay "the half improved value and was the issue of the Crown

1. 15 A. C. 223. 2. (1911) 14 N. L. R. 237.

Manis Appuhamy v. Nona et al

Pereira J.

"grant to Juanis proper"? The present contention is not covered by this issue. The issue presupposes that Juanis was alive at the date of the issue of the grant, and the question here really is whether the issue of the grant to him was proper if Singho Appu had paid the half improved value. Mr. Jayewardene then cited to me the case of the "*Tasmania*"[1] There it was held that a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been offered them when in the witness box. I am not sure that this ruling would apply to a system of procedure in which the framing of issues at the trial is an essential step except to the extent of admitting a new contention urged for the first time in the Court of Appeal which, though not taken at the trial, is still admissible under some one or other of the issues framed. Under our procedure all the contentious matter between the parties to a civil suit is, so to say, focussed in the issues of law and fact framed. Whatever is not involved in the issues is to be taken as admitted by the one party or the other, and I do not think that under our procedure it is open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the Court below under some one or other of the issues framed, and when such a ground, that is to say, a ground that might have been put forward in the Court below is put forward in appeal for the first time, the cautions indicated in the case of the "*Tasmania*"[1] may well be observed.

I see no reason to disagree with the commissioner on his decision on the question as to prescriptive possession. Affirmed.

Affirmed.

Proctor for appellants—*Solomon Fernando.*

Proctor for respondent—*P. A. Gooneratne.*

1. 15 A. C. 223.

FERNANDO v. ALIA MARIKAR.

No. 17,107 P. C. Negombo.

18th July, 1912.

Penal Code § 183—verbal refusal to allow a public servant to perform his duty—"Voluntarily obstructing"—evidence necessary of overt act done or physical means used.

A mere verbal refusal to allow a public servant to perform his duty does not constitute "voluntarily obstructing" within the meaning of § 183 of the Penal Code.

There must be some overt act done or physical means used.

Hendrick v. Kirihamy [1] followed.

Rasawasagram v. Siwandi [2] distinguished.

The appellant in this case, was charged with another under §§ 484 and 486 of the Penal Code with abusing and threatening the complainant, and the appellant alone was charged under § 183 with voluntarily obstructing the complainant, a public servant, who is a Sanitary Overseer of the Local Board, in the discharge of his public functions as such Sanitary Overseer. The complainant in his evidence said: "I am assistant to the Sanitary Inspector. I get Rs. 25 a month. I report to the Inspector. On the 27th April at 4 p.m. the accused had onions in a box on the drain. I told accused to remove them. The accused Ali refused. I bent to take the box. The accused Ali prevented me from taking the box. The accused Ali abused me in indecent language." The 1st accused stated in his evidence that the box was placed there so that its contents might be removed by the scavengers. The Police Magistrate dismissed the former charges and convicted the 1st accused under the latter charge and sentenced him to pay a fine of Rs. 45, in default to undergo one month's rigorous imprisonment.

The accused appealed.

1. *2 Leader 105.* 2. *(1905) 9 N.L.R. 88.*

Fernando v. Ali Marikar

Lascelles C. J.

E. G. P. Jayetileke for the accused-appellant.—The facts show that the complainant is an assistant to the Sanitary Inspector and that his duties are to report to the Inspector. There is no evidence that he has the power to act independently of the Inspector in any matter connected with the public health etc: In these circumstances he can hardly be called a "public servant" within the meaning of clause 9 of § 19 of the Penal Code. [*Lascelles C. J.* He is paid out of public funds.] If that were the test to be applied, every Government servant would come under the term "public servant". Under clause 9 only an "officer of Government" can be a public servant. It is therefore submitted that the test would depend on the nature of the duties that each man has to perform. Even assuming that the complainant is a public servant there is no evidence that the accused "voluntarily obstructed" him. To satisfy the provisions of § 183 of the Penal Code there must be evidence of some overt act done or physical means used by the accused. A mere refusal to allow a public servant to do his duty does not amount to "voluntarily obstructing" (See *Hendrick v. Kirihamy* [1]). In India the current of authority has run in the same direction (see *Ratanlal's Law of Crimes pages 233 & 234*). The accused was justified in keeping the box on the edge of the road (See *The Local Board By-Laws Ch: VI. 2. at p. 288 of Vol. ii Legislative Enactments*); and therefore the complainant cannot be said to have been acting at the time in the discharge of his public functions.

Mr. H. A. Jayewardene as *amicus curiae* referred the Court to the case of *Rasawasagram v. Sivandi* [2].

c. a. v

Lascelles C. J.—In this case the appellant and another were charged with abusing and threatening the complainant under §§ 484 and 486 of the Penal Code, and the appellant was charged under § 183 of the Code with obstructing the complainant who is a Sanitary Overseer of the Local Board.

1. *2 Leader 105.* 2. *(1905) 9 N.L.R. 88.*

Fernando v Alia Marikar

Lascelles C. J.

The appellant now, appeals from his conviction under the latter charge the former charges having been dismissed.

Assuming that the complainant is a public servant within the meaning of § 183 of the Penal Code the question arises whether the appellant is proved to have done any acts which amount to "voluntarily obstructing" the complainant in the discharge of his public functions.

The complainant, who is not likely to understate his case, deposed as follows :—"The accused had onions in a box on the drain. I told accused to remove them. The accused Ali refused. I bent to take the box. The accused Ali prevented me from taking the box. The accused Ali abused me in indecent language."

Except a vague statement by one witness (Manuel Fernando) that the appellant "pushed the box," there is no evidence of any physical obstruction on the part of the accused. The evidence is that the accused did no more than refuse to allow the complainant to remove the box; and that there was an altercation between the two. A mere verbal refusal to allow a public servant to perform his duty does not constitute 'voluntarily obstructing' within the meaning of § 183. *Hendrick v. Kirihamy* [1]. There must be some overt act done or physical means used.

The Indian authorities on the corresponding section of the Indian Penal Code are decisive on the point. The case of *Rasawasagram v. Siwandi* [2] is not a decision to the contrary for the language of the enactment there under consideration (Section 6 sub-sec : 1 of Ordinance 3 of 1897), as was pointed out by Wood Renton J. differs materially from that of § 183 of the Indian Penal Code.

I am of opinion that the evidence in the record does not disclose an offence under § 183 of Penal Code and I set aside the conviction and sentence.

Conviction and sentence set aside.

Proctor for appellant—*H. A. Jayetileke.*

1. *2 Leader 105.* 2. *(1905) 9 N.L.R. 88*

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